(25,286)

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1916.**

## No. 478.

THE ARIZONA COPPER COMPANY, LIMITED, PLAINTIFF IN ERROR,

*vs.*

RICHARD BRAY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ARIZONA.

INDEX.



JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 13, 1916.

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1 *Names and Address- of Counsel.*

L. Kearney, Clifton, Arizona; Frank E. Curley, Tucson, Arizona, Counsel for Plaintiff.

W. C. McFarland and H. A. Elliott, Clifton, Arizona, Counsel for Defendant.

2 In the District Court of the United States for the District of Arizona.

RICHARD BRAY, Plaintiff,
vs.
THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Defendant.

*Complaint.*

Plaintiff above named complains of defendant and alleges:

1.

That plaintiff is a resident of the county of Greenlee, in the State of Arizona, and at the time hereinafter mentioned was, and now is, a citizen of the said State of Arizona.

2.

That defendant, The Arizona Copper —, Limited, at all times hereinafter mentioned was and now is, a corporation, duly incorporated under the Acts of Parliament of the United Kingdom of Great Britain and Ireland, known as the Company's Act, 1862 to 1883, having its registered office at Edinburg, Scotland, and at all such times was and now is a corporation subject of Great Britain, and that it has filed its appointment of its statutory agent in the office of the Arizona Corporation Commission, at Phoenix, Arizona, and also filed its appointment of its statutory agent in the office of the county recorder of the county of Greenlee, State of Arizona, and that it has published its articles of incorporation and filed the same in the office of said Arizona Corporation Commission, and that it has fully complied with all the requirements of law pertaining to foreign corporations doing business herein mentioned it was, has been,
3 and yet is, such foreign corporation, lawfully doing business at said Greenlee County, and engaged in the business of mining, smelting, conducting machine shops, concentrator works, electric plants, railroading, treating and reducing ores, conducting stores, and engaged in divers other business pursuits at said Greenlee County, in its corporate name of "The Arizona Copper Company, Limited."

3.

That prior to and on August 4th, 1914, and at the time the plaintiff received the injuries herein complained of, he was employed by and in the employment of the defendant. The defendant is the owner of a mine at Morenci, in said Greenlee County; that in said mine on the said 4th day of August, 1914, the plaintiff was employed by the defendant; that on said day while in said employment while engaged in his said work for the defendant and while acting within the scope of his duties and while acting under the said contract of employment as such employee of the defendant, the plaintiff received injuries to his head and body, in said mine.

4.

That the said injuries to plaintiff were occasioned by the condition and conditions of his said employment while working in the hazardous employment as a miner in defendant's said mine and in a tunnel of defendant's said mine while underground; that the circumstances and conditions of said injuries and of said tunnel were as follows: On or about said 4th day of August, 1914, the plaintiff was employed, as a miner, by the defendant to drive a tunnel for the defendant in its said mine; that while engaged in his said employment a large quantity of rock and earth sloughed away from the top of said tunnel and fell upon and striking plaintiff violently on his head causing him to fall and rendered him unconscious for a long time, and producing in him a weak, giddy, nauseated and confused condition, and which said rock striking him on the head caused and abscess * contusion, concussion ^ of the brain, and resulting in para-ysis of the nerves, and in loss of motor power, and permanently disorganized his nervous system, and that on account of said injuries he was for a long time compelled to undergo a hospital treatment at said Morenci, and thereafter necessarily went to Salt Lake City, Utah, for medical treatment, and necessarily expended on such trip $150, and was necessarily confined in a hospital at said Salt Lake City from Oct. 20, 1914, to Nov. 4, 1914, and ever since said injuries has been under treatment of skilled physicians and surgeons, but has been unable to recover from said injuries, and that his condition is such that he never will be able to recover from said injuries, and that as the direct result of said accident he is greatly injured in body and mind, and that he is not now, and never will be, able to perform any kind of manual labor, and that his said injuries are permanent; that ever since said injuries the plaintiff has been in hospitals and under the care of skilled physicians; that ever since said injuries he has suffered great mental and physical pain, and yet suffers, and will continue to suffer pain. That all of said injuries and pains are the approximate result of said accident. That plaintiff

4

* Interlineation made by Clerk by order of Court. George W. Lewis, Clerk.

has necessarily been out for hospital bills and doctors' fees the sum of $600.00, all of which are reasonable charges.

5.

That at the time of said injuries, the plaintiff was engaged in manual and mechanical labor in the employment of the defendant; that said injuries were the result of an accident due to a condition of such occupation and of a place where the plaintiff was at work; that said injuries were not caused by the negligence of the plaintiff; that said injuries were the natural and proximate result of said condition or conditions of the employment of said plaintiff within said mine and of the place of the performance of said work.

6.

That plaintiff at the time of his said injuries was 49 years of age, and was a skilled workman, and then earning wages from $105.00 to $120 per month, and capable of earning such wages within the line of his said employment, as such skilled worker; that he was strong, healthy, able bodied and never had any sickness, and was intelligent and industrious; that his expectancy of life at the time of his said injuries was 21.6 years; that since said injury plaintiff has been unable to perform any kind of labor and has lost in wages $892.00.

That in view of said premises the plaintiff has been and is damaged in the sum of fifty thousand dollars, and for which the defendant is liable.

Wherefore, plaintiff demands judgment against defendant for the sum of fifty thousand ($50,000.00) dollars; together with cost herein.

FRANK E. CURLEY,
*Of Tucson, Arizona, and*
L. KEARNEY,
*Residing at Clifton, Arizona,*
*Attorneys for Plaintiff.*

Endorsements: No. 44. Tucson. In District Court of United States, District of Arizona. Richard Bray vs. The Arizona Copper Company, Limited, a corporation. Complaint. Filed June 17, 1915, at 9:40 A. M. George W. Lewis, Clerk, by George C. Pollock, Deputy.

6 UNITED STATES OF AMERICA:

District Court of the United States, District of Arizona.

RICHARD BRAY, Plaintiff,
vs.
THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Defendant.

Action Brought in said District Court and the Complaint Filed in the Office of the Clerk of said District Court, in the City of Tucson and County of Pima.

The President of the United States of America to the Arizona Copper Company, Limited, a corporation, defendant, Greeting:

You are hereby directed to appear, and answer the Complaint in an action entitled as above, brought against you in the District Court of the United States, in and for the District of Arizona, within twenty days after the service on you of this summons—if served within this County; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said Plaintiff will take judgment for any money or damages demanded in the Complaint, as arising upon contract, or—will apply to the Court for any other relief demanded in the Complaint.

Witness the Honorable William H. Sawtelle, Judge of said District Court, this 21st day of June, in the year of our Lord one thousand nine hundred and fifteed and of our independence the one hundred and thirty ninth.

[Seal of Court.]

GEORGE W. LEWIS, *Clerk*,
By EFFIE D. BOTTS,
*Deputy Clerk.*

7 United States Marshal's Office, District of Arizona.

I hereby certify that I received the within writ on the 23rd day of June, 1915, and personally served the same on the 23rd day of Jube, 1915, upon The Arizona Copper Co., Limited, by delivering to, and leaving with J. G. Copper, as Statutory Agent for the Arizona Copper Company, Limited, a corporation, Said defendant named therein personally, at the County of Greenlee, in said District, a certified copy thereof, together with a copy of the Complaint, certified to by the Clerk of the United States District Court attached thereto.

J. P. DILLON,
*U. S. Marshal,*
By IRA N. DILLINER,
*Office Deputy.*

Returned this June 25th, 1915.
Marshal's fees $4.00. Paid by Plaintiff.

Endorsements: Marshal's Docket No. 495. No. 44. Tucson. U. S. District Court, District of Arizona. Richard Bray, Plaintiff, vs. The Arizona Cop-er Company, Limited, a corporation, Defendant. Summons. L. Kearney, Clifton, Arizona, F. E. Curley, Tucson, Arizona, Plaintiff's Attorneys. Filed July 6th, 1915. George W. Lewis, Clerk, by Effie D. Botts, Deputy Clerk.

8 In the District Court of the United States for the District of Arizona.

RICHARD BRAY, Plaintiff,
vs.
THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Defendant.

*Amended Answer.*

Comes now the defendant, the Arizona Copper Company, Limited, by leave of the court, and files this, its first amended answer, to the complaint of plaintiff, and demurs thereto, and for grounds of demurrer assigns the following:

I.

It appears upon the face of said complaint, in fact it is admitted by the plaintiff as shown by the record, that plaintiff seeks to recover judgment against defendant under and by virtue of the provisions of Chapter VI of Title XIV, Revised Statutes of Arizona, 1913, known as the Employers' Liability Law, enacted pursuant to the provisions of Section VII of Article XVIII, of the Constitution of the State of Arizona, without any charge or showing of negligence, wrong or default on the part of this defendant, causing or contributing to plaintiff's alleged injury, and that said Employers' Liability Law and said Section VII of Article XVIII, of the Constitution of the United States, particularly of the Fourteenth Amendment thereto, in that they seek to deprive this defendant of its property without due process of law, and to deny it the equal protection of the laws of the State of Arizona, by subjecting it to unlimited liability for damages for personal injuries suffered by its employee without any fault, wrong, or negligence on the part of this defendant,
9 causing such injuries or contributing thereto, and that for the reasons in this paragraph above set forth, said complaint, does not state facts sufficient to constitute a cause of action against this defendant.

II.

That it appears on the face of said complaint that plaintiff seeks to recover judgment against defendant under and by virtue of the provisions of Chapter VI, of Title XIV, of the Civil Code, Revised Statutes of Arizona, 1913, known as the Employers' Liability Law, and that said Employers' Liability Law is in violation and contravention of the Constitution of the State of Arizona, and particu-

larly of Sections 5 and 7, of Article XVIII thereof, in that said Employers' Liability Law attempts to give plaintiff the right to recover damages of defendant in this action notwithstanding the injuries for which such damages are claimed were contributed to and in part caused by plaintiff's own negligence, and attempts to deprive defendant of the right to wholly defeat this action by showing that said injuries were contributed to and in part caused by plaintiff's own negligence, and that for the reasons in this demurrer set forth, said complaint does not state facts sufficient to constitute a cause of action against defendant.

III.

That it does not appear in and by the allegations of plaintiff's complaint that plaintiff at the time and place of his alleged injury or injuries was engaged in a labor, service, employment or occupation in any way or manner mentioned and provided for in Chapter 6 of Title 14 of the Revised Statutes of the State of Arizona, 1913.

10

IV.

That it does not appear in and by the allegations of said complaint that plaintiff's alleged injury or injuries were caused by or resulted from any accident or accidents to this plaintiff in the course of work in his employment or occupation, as in said complaint alleged and set forth, arising out of and in the course of plaintiff's labor, service and employment and due to a condition or conditions of plaintiff's said occupation or employment.

V.

That it appears in and by the allegations of said complaint that if this plaintiff has any cause of action against this defendant, it is by reason of the negligence of this defendant, its servants, employees or other agents, and not by reason of an accident or accidents to this plaintiff in the course of work in his employment or occupation as in said complaint alleged, arising out of and in the course of his labor, service and employment and due to a condition or conditions of his said occupation or employment.

VI.

That it does not appear in said complaint that plaintiff's alleged injury or injuries was not caused by his own negligence.

VII.

That it appears in said complaint that the alleged injury or injuries of this plaintiff, if any there were, were occasioned, wholly by, and resulted from the usual and ordinary risks of the employment in which plaintiff was engaged at the time and place of the said alleged injury or injuries as in said complaint described, and

were wholly assumed by this plaintiff in entering on and con-
11 tinuing in said employment, or by the exercise of reasonable diligence on the part of this plaintiff, could have been fully known to and appreciated by him, in that it is not alleged in said complaint that the dangers of said employment at the time and place and in the manner mentioned and described in said complaint, were latent or hidden from or undiscovered to this plaintiff, and that by the exercise of due or any diligence or care for his personal safety, that he could not have discovered said conditions and have thereby avoided his said injury or injuries.

VIII.

That it is not alleged in said complaint that the acts and things done or said by the officers, servants, employees or other agents of this defendant, at the time and place of plaintiff's alleged injury or injuries by this plaintiff in his complaint alleged to have caused the said injury or injuries, were done and said by such officers, servants, employees or other agents of this defendant, while acting within the course of the employment and within the scope thereof of said officers, servants, employees or other agents, while then and there in the employ of this defendant.

IX.

That said complaint does not state facts sufficient to constitute a cause of action against this defendant.

Wherefore defendant prays judgment as to the sufficiency of said complaint in the particulars hereinabove specified and that plaintiff take nothing thereby and that defendant go hence with its costs.

W. C. McFARLAND,
H. A. ELLIOTT,
*Attorneys for Defendant.*

Without waiving any of the foregoing demurrers, but if the same shall be overruled or denied, this defendant further answer-
12 ing said complaint admits, denies and alleges as follows:

1.

Admits the allegations of Paragraphs 1 and 2 of plaintiff's complaint.

2.

Admits that prior to and on August 4th, 1914, *(and at the time this plaintiff received the injury or injuries mentioned and complained of in said complaint,) plaintiff was employed by and in the employment of this defendant. Denies that this plaintiff received injury or injuries in defendant's mines as mentioned and described in said complaint on last said date or at any other time while this plaintiff was engaged in his work for the defendant, or while acting in the scope of his duties as miner, as in said complaint described

or at any other time or at all. And in this connection this defendant alleges that if plaintiff received any injury or injuries at the date in said complaint alleged, or at any other time, said injury or injuries were the direct and proximate result of the *(carelessness and) negligence of plaintiff, and but for said *(carelessness and) negligence on the part of the plaintiff said injury or injuries, if any, would not have happened.

3.

Defendant answering Paragraph 4 of said complaint, denies that the injury or injuries, if any, were occasioned by the condition or conditions of his said employment while working in a hazardous employment as a miner in defendant's said mine, or in a tunnel of said defendant's said mine; and defendant further answering said Paragraph 4 denies that on the 4th day of August, 1914, or at any other time while plaintiff was engaged in driving a tunnel for defendant in its said mine, and denies while plantiff was engaged in
13 his said employment on said 4th day of August, 1914, or at any other time, a large quantity of rock and earth sloughed away from the top of said tunnel and fell upon and struck plaintiff violently on his head, and denies that the rock and earth in said paragraph alleged at the time stated in said paragraph, or at any other time, fell upon the head of plaintiff, and denies that the result of said fall of said rock and earth caused at the time stated in the complaint, or at any other time, or at all, the results as in said Paragraph 4 stated. And further answering said Paragraph 4 denies that the effect of the fall of the rock and earth, as in plaintiff's complaint alleged, produced contusion and concussion of the brain; denies that the same resulted in paralysis of the nerves, loss of motive power, but admits that plaintiff underwent hospital treatment at Morenci, Arizona, but as to his treatment in Salt Lake City, Utah, and the expenditure of $150 therefor, defendant has no knowledge or information sufficient to form a belief, and therefore denies the same. Denies that said injury or injuries, if any, were permanent.

4.

*(For further defense to said complaint defendant alleges that the alleged injury or injuries, if any, were suffered by plaintiff, either as alleged in said complaint, or otherwise, were wholly occasioned by and wholly resulted from the open, usual and ordinary risks from the employment in which plaintiff was engaged at the time and place of his alleged injury or injuries, as in said complaint described, which said risks of said employment were wholly assumed by plaintiff by entering upon and continuing in said employment. That said risks were fully known to and appreciated by said plaintiff in entering upon and continuing in said em-
14 ployment, or by the exercise of reasonable diligence on his part, should have been fully known and appreciated by him.)

Wherefore, defendant prays that plaintiff take nothing by his action, and for its costs.

W. C. McFARLAND,
H. A. ELLIOTT,
*Attorneys for Defendant.*

*(Further answering said complaint as a separate defense to this action, defendant alleges that the alleged injury or injuries, if any, were suffered by plaintiff, either as alleged in said complaint or otherwise, by plaintiff's own want of care, and but for such want of care such accident or injury would not have occurred.)

Wherefore, defendant prays that plaintiff take nothing by his said action, and for its costs.

W. C. McFARLAND,
H. A. ELLIOTT,
*Attorneys for Defendant.*

Defendant further answering said complaint denies each and every allegation therein contained, except those expressly admitted, and having fully answered, asks to be discharged with its costs.

W. C. McFARLAND,
H. A. ELLIOTT,
*Attorneys for Defendant.*

NOTE.—*Denotes portions stricken out of original amended answer as shown by minutes.

Endorsements: No. 44 Tucson. In the District Court of the United States for the District of Arizona. Richard Bray vs. The Arizona Copper Company, Limited, a corporation, First Amended Answer. Filed Nov. 2, A. D., 1915, at 10:30 A. M. George W. Lewis, Clerk, by Effie D. Botts, Deputy Clerk.

15 In the District Court of the United States for the District of Arizona.

RICHARD BRAY, Plaintiff,
vs.
THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Defendant.

*Demurrer.*

Comes now plaintiff, Richard Bray, and demurs to paragraph four of defendant's answer found on page six thereof, for the reason that the same does not constitute, or tend to support, any defense to plaintiff's cause of action, set forth in his complaint.

L. KEARNEY,
FRANK E. CURLEY,
*Attorneys for Plaintiff.*

Endorsements: No. 44 Tucson. In the District Court of the United States, District of Arizona. Richard Bray, Plaintiff, vs. The Arizona Copper Company, Limited, a corporation, defendant. Demurrer. Filed Nov. 2, 1915. George W. Lewis, Clerk, by Effie D. Botts, Deputy Clerk.

16 In the United States District Court for the District of Arizona.

No. 44.

RICHARD BRAY, Plaintiff,
vs.
THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Defendant.

Minute Entry Made on Tuesday, November 2nd, 1915.

Upon motion of the defendant, it is ordered that the defendant be granted leave to file an amended answer herein and thereupon defendant files said amended answer. Thereupon it is ordered by the Court that the demurrer of the defendant to plaintiff's complaint be and the same is hereby overruled, to which ruling of the court, defendant excepts. Thereupon the plaintiff moves the court to strike from the defendant's amended answer in lines five and six at the top of page five the words "Carelessness and," which motion is granted by the Court and said words ordered stricken from defendant's amended answer, to which ruling of the court, defendant excepts. Thereupon plaintiff moves the Court to strike from defendant's amended answer on page six of paragraph four, beginning with the words "Further answering said complaint as a separate defense" down to and including the words "injury would not have occurred" and upon consideration by the Court it is ordered that said motion be and the same is hereby granted by the Court, to which ruling of the Court, defendant excepts. Thereupon it is ordered by the Court that plaintiff's demurrer to defendant's answer as contained in paragraph 4 at the top of page six be and the same is hereby sustained, to which ruling of the Court, defendant excepts.

17 In the United States District Court for the District of Arizona.

No. 44.

RICHARD BRAY, Plaintiff,
vs.
THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Defendant.

Minute Entry Made on Monday, November 29th, 1915.

The plaintiff this day asks leave of the Court to amend his complaint herein by striking out the word "and" at the end of line 23

on page 2 of said complaint and by inserting after the word "concussion" in line 24 on page 2 of said complaint, the words "and abscess" and it is ordered by the court that said amendment be allowed and that the Clerk insert said amendment in ink and note same on the margin of the complaint and same is done by the Clerk in open Court.

18 *Proceedings of the Trial Cause.*

In the United States District Court for the Dirtrict of Arizona.

No. 44.

RICHARD BRAY, Plaintiff,

vs.

THE ARIZONA COPPER COMPANY, Limited, a Corporation, Defendant.

Minute Entry Made on Thursday, December 2, 1915.

This case came on this day regularly for trial, the plaintiff appearing in person and with his counsel, F. E. Curley, Esquire, and L. Kearney, Esquire, comes now the defendant herein by its counsel, W. C. McFarland, Esquire, and H. A. Elliott, Esquire, and both parties announce ready for trial. A jury of eighteen was called, sworn and examined as to their qualifications. F. O. Benedict, was excused by the Court, neither side objecting, and Henry Meyer, Jr., was called, sworn and examined in his place. The eighteen jurors now in the jury box were all found to be qualified and accepted by both sides. Thereupon the plaintiff strikes three and the defendant three, and the remaining twelve, to-wit: W. B. Dolan, James Hall, B. E. Snyder, R. Schurtz, O. A. Haskins, James F. Cunningham, O. M. Anderson, B. M. Pacho, L. G. Moore, O. Z. Kane, Edward W. Borton, and Henry Meyer, Jr., were called according to law and sworn to well and truly try the issues joined herein. H. C. Nixon was used as court reporter in this case. The defendant asks leave of the Court to amend its amended answer herein by striking out
19 the words "and at the time this plaintiff received the injury or injuries mentioned and complained of in said complaint" in paragraph 2 on page 4 of defendant's amended answer and said amendment is allowed by the court. L. Kearney, Esquire, reads plaintiff's complaint and makes opening statement. H. A. Elliott, Esquire, reads defendant's amended answer and waives and reserves making statement until plaintiff's evidence is all in. Defendant invokes the rule and all witnesses for plaintiff and defendant, except plaintiff are excluded from the Court room during the trial of this case. The plaintiff then to maintain upon his part the issues herein, called as witness, Richard Bray, who was sworn, examined and cross examined. The deposition of Dr. Root was read in evidence in this case. The hour for adjournment having arrived and the trial of this case not having been completed, the Court duly admonished the jury and excused them from further attendance upon this case until Friday, the 3rd day of December, A. D., 1915, at 9:30 o'clock A. M.

Minute Entry Made on Friday, December 3rd, 1915.

This case having been continued from a previous session of this Court, comes now the parties hereto, and comes also the jurors herein, their names are called and all answering thereto respectively, the further trial of this case proceeds as follows. The reading of the deposition of Dr. E. F. Root was resumed and completed. The depositions of Dr. Brown Ewing, Dr. J. O. Evans, Dr. John J. Galligan, were read in evidence. Dr. Mead Clyne was called as a witness on behalf of the plaintiff, sworn, examined and cross examined. Dr. I. E. Huffman was called as a witness on behalf of the plaintiff, sworn, examined and cross examined. Mrs. Mable Bray was
20 called as a witness on behalf of the plaintiff, sworn, examined and cross examined and thereupon the plaintiff rested his case. The plaintiff Richard Bray was called as a witness for the defendant under the statute as if on cross-examination and was examined. The defendant then called as witnesses on its behalf, Richard Williams, Dr. Butler, Dr. G. Goodrich, Dr. Mark Rodgers and Noah Green, who were duly sworn, examined and cross examined and thereupon the defendant rested its case. Richard Bray was recalled by the plaintiff in rebuttal and further examined and cross examined. Dr. Huffman was recalled by the plaintiff in rebuttal and further examined and cross examined, and trereupon the plaintiff rested his case. Thereupon the defendant moves the Court to direct the jury to bring in a verdict for the defendant on the following grounds:

1st. That it has not been shown that plaintiff's condition is due to an injury received in defendant's employ and due to a condition or conditions of plaintiff's employment;

2nd. That the evidence would not support a verdict for the plaintiff.

3rd. That the Employers' Liability Act under which plaintiff seeks to recover is unconstitutional, for the reason that it fixes an unlimited liability upon defendant without fault, and deprives the defendant of the equal protection of the laws, and of its property without due process of law.

And said motion is denied by the Court, to which ruling of the Court, defendant excepts. There being no further testimony offered by either side and the evidence being closed, argument was had on behalf of the plaintiff by Frank E. Curley, Esquire. Thereupon defendant waives argument, and the hour for adjournment having arrived, the court duly admonished the jury and excused them from further attendance upon this court until Saturday, the 4th day of December, A. D., 1915, at 9:30 A. M., to which time the further hearing of this case is now ordered continued.

21 Minute Entry Made on Saturday, December 4, 1915.

This case having been continued from a previous session of this Court, comes now all the parties hereto and comes also the jurors herein, their names are called and all answering thereto respectively,

the further trial of this case continues. The arguments of counsel having been waived and completed on yesterday, the Court now instructs the jury orally and thereupon the defendant excepts to that portion of the charge to the jury which defines the term "condition or conditions of him employment" for the reasons set out in the reporter's transcript and notes. Thereupon the jruy retire in charge of L. V. Russell, bailiff, officer of this court, first duly sworn for that purpose, to consider their verdict. And subsequently said jury return into court, their names are called and all answering thereto respectively, upon being asked if they have agreed upon a verdict, report that they have agreed and thereupon present the following verdict:

"RICHARD BRAY, Plaintiff,
vs.
ARIZONA COPPER COMPANY, LIMITED, a Corporation, Defendant.

*Verdict.*

We, the July duly empaneled and sworn in the above entitled action, upon our oaths do find for the plaintiff and assess his damages at the sum of $9000.00.

O. Z. KANE, *Foreman.*

Thereupon it is adjudged that the plaintiff is entitled to recover of and from the defendant the sum of $9000.00, with costs, and it is ordered that judgment be entered in favor of the plaintiff and against the defendant in accordance with the verdict. Thereupon the jury is ordered discharged from this case. Upon stipulation of counsel it is ordered that the defendant may have a stay of execution of forty-two days from this day in which to prepare and file its motion for a new trial herein.

RICHARD BRAY, Plaintiff,
against
ARIZONA COPPER COMPANY, LTD., a Corporation, Defendant.

*Verdict.*

We, the July, duly empaneled and sworn in the above entitled action, upon our oaths, do find for the plaintiff and we do assess his damages at the sum of Nine Thousand Dollars.

O. Z. KANE, *Foreman.*

Endorsements: No. 44 Tucson, United States District Court, District of Arizona. Richard Bray, Plaintiff, vs. Arizona Copper Co., Ltd., a corporation, Defendant. Verdict. Filed Dec. 4, 1915. George W. Lewis, Clerk.

24 In the District Court of the United States for the District of Arizona.

RICHARD BRAY, Plaintiff,
vs.
THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Defendant.

*Judgment.*

This action came on regularly for trial the 2nd day of December, 1915, the plaintiff being present and represented by his attorneys L. Kearney, Esq., and Frank E. Curley, Esq., and the defendant being represented by its attorneys W. C. McFarland, Esq., and H. A. Elliott, Esq., A jury of twelve men were regularly impanelled and sworn to try said action. Witnesses on the part of plaintiff and defendant were sworn and examined. After hearing the evidence and argument of counsel and the instructions of the court the jury retired to consider of their verdict and subsequently, on the 4th day of December 1915 returned into court and being called answered to their names and say that they find the verdict for the plaintiff and against the defendant in the sum of nine thousand ($9,000) dollars.

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged and decreed that the plaintiff Richard Bray do have and recover of and from said defendant, The Arizona Copper Company, Limited, a corporation, the sum of nine thousand ($9,000) dollars with interest thereon at the rate of six (6%) per cent per annum from date hereof until paid together with the plaintiff's costs and disbursements incurred in this action amounting to the sum of $184.55, with interest thereon at the
25 rate of six (6%) per cent per annum from date hereof until paid, and for which let execution issue.

Judgment rendered December 4th, 1915.

Endorsements: No. 44 Tucson. In the District Court of the United States for the District of Arizona. Richard Bray, Plaintiff, vs. The Arizona Copper Company, Limited, a corporation, Defendant. Judgement. Filed December 4th, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy Clerk.

26 In the United States District Court for the District of Arizona.

RICHARD BRAY, Plaintiff,
vs.
THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Defendant.

*Proposed Bill of Exceptions.*

Be it remembered, that on the 2nd day of December A. D., 1915, at a regular and stated term of the United States District Court for

the District of Arizona, the same being one of the regular judicial days of the November term of court, 1915, begun and holden in the City of Tucson, Arizona, before his Honor, William H. Sawtelle, District Judge, the issues joined by the pleadings in said cause came on to be tried by the said Judge and the jury empanelled and sworn to try the issues in said cause. The plaintiff was represented by L. Kearney, and F. E. Curley, his attorneys and the defendant by W. C. McFarland and H. A. Elliott, its attorneys.

To sustain the issues on the part of the plaintiff and on the part of the defendant, the following evidence was introduced.

27 In the District Court of the United States, District of Arizona.

Case No. 44.

RICHARD BRAY, Plaintiff,
vs.
THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Defendant.

Before Honorable William H. Sawtelle, Presiding Judge.

(Tucson, Ariz., December 2nd, 1915.)

*Transcript of Testimony.*

Appearances:

For the Plaintiff: L. Kearney, Esq., F. E. Curley, Esq.
For the Defendant: W. C. McFarland, Esq., H. A. Elliott, Esq.,

Be it remembered that this cause coming regularly on for trial on Thursday, December 2nd, 1915, before the presiding judge of the above-entitled court and a jury duly empanelled and sworn to try the issues, the following proceedings were had and testimony introduced, to-wit:

28 *Index.*

Plaintiff's Witnesses.

Defendant's Witnesses.

| | Direct. | Cross. | Re-direct. | Re-cross. |
|---|---|---|---|---|
| Richard Bray (called under statute) | 44 | | | |
| Richard Williams | 51 | 55 | | |
| Dr. J. I. Butler | 57 | 60 | 67 | 68 |
| Dr. G. E. Goodrich | 69 | | | |
| Dr. Mark A. Rodgers | 71 | 72 | 73 | |
| Noah Green | 73 | 76 | | |

Plaintiff's Witnesses in Rebuttal.

| | Direct. | Cross. | Re-direct. | Re-cross. |
|---|---|---|---|---|
| Richard Bray | 78 | 79 | | |
| Dr. I. E. Huffman | 79 | | | |

Court's Instructions, page 82.

29 Mr. Curley: If your Honor please, we will ask at this time that the witnesses be called and placed under the rule.

(All the witnesses in the case were called and sworn, and after being duly admonished by the Court were excluded from the court room.)

Mr. Elliott: If the Court please, I will direct your Honor's attention to a phrase appearing in the defendant's answer on page 4, under Paragraph 2 of that answer: "Admits that prior to and on August 4, 1914, at the time this plaintiff received the injuries mentioned and complained of in said complaint, plaintiff was employed by and in the employ of this defendant." There is an error or a slip in the statement of the pleading there. As worded, it might imply an admission of the receiving of injuries on the part of the plaintiff, which is not the intention at all; and we will ask at this time to amend by striking out beginning with the words, "and at the time" at the end of the first line in Paragraph 2, down to and including the word "complaint" in the third line of said Paragraph 2.

The Court: Well, the next sentence shows that you deny that he received any injury or injuries at all. Any objection to that?

Mr. Curley: No, we have no objection, if your Honor please.

The Court: Those words may be stricken out. You may read your complaint to the jury.

Mr. Kearney: Gentlemen of the jury, I will read to you the plaintiff's complaint.

(Counsel for plaintiff read the complaint to the jury.)

The Court: The defendant will read the answer.

Mr. Elliott: If the Court please, and gentlemen of the jury, I will now read defendant's answer to the merits of this case, beginning on page 4, paragraph- 1 and 2.

(Counsel for defendant read the answer to the jury.)

Mr. Curley: Paragraph 4 was stricken out.

Mr. McFarland: Has your Honor any memoranda that would refresh you- mind on that?

The Court: Where were you reading from, Mr. Elliott?

Mr. Curley: Page 6 of the answer, in the middle of the page.

The Court: Yes, I struck that out because it is a plea of negligence, and that plea has already been interposed.

Mr. McFarland: Negligence on the part of the plaintiff.

30 The Court: Yes, as I understand it.

Mr. Curley: That is was surplusage.

The Court: Yes, your plea Number 2 of your answer sets up that the injury, if any was sustained, was by reason of the negligence of the plaintiff, and therefore, if that was not stricken out, it should be, and if you haven't had an exception, I will not give you one.

Mr. McFarland: We will take an exception now, if your Honor please.

The Court: The Clerk will examine his minutes, and if I am in error about this, why the record will be corrected.

Mr. McFarland: I understand that the separate answer there has been stricken out, except the general denial.

The Court: No, the general denial and the special plea of negligence on the part of the plaintiff.

Mr. McFarland: Those remain?

The Court: They remain.

Mr. McFarland: So that the record will speak the truth, because that is all we care for.

The Court: The Clerk will examined his minutes and refer to it.

Mr. Curley: That was done on the 2nd of November.

The Court: Go ahead. Call your witness.

Mr. Elliott: If the Court please, the defendant at this particular time waives its right to make a statement of the case. We will do so before the presentation of our defense.

The Court Very well, you may do so.

RICHARD BRAY, the plaintiff herein, called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Kearney:

Q. State your name?
A. Richard Bray.
Q. What is your age, Mr. Bray?
A. Forty-nine.
Q. When were you forty-nine?
A. Last July I was forty-nine.
Q. What place do you claim as your residence?
A. Arizona?
Q. What?
A. Arizona.
Q. You claim Arizona?

A. Yes sir.

Q. I will ask you if you are the Richard Bray named in this paper? (Handing paper to witness.)

A. Yes sir.

31 Q. That was issued to you?

A. In 1900, final papers, in 1888 for the first time.

Mr. McFarland: If the Court please, before he is examined on that subject, we would like to see that paper.

The Court: I understand the answer admits the citizenship, does it not?

Mr. Kearney: Yes, it does.

The Court: Why do you want to prove it? It is a loss of time.

Mr. Kearney: I will ask to introduce this and have it marked as Plaintiff's Exhibit 1.

The Court: No, I decline to admit any paper that is not required to be introduced in evidence. It is taking up the time of the court unnecessarily. We will only try the issues that are raised by the pleadings.

Mr. Kearney:

Q. Mr. Bray, what is your vo-ation? What do you follow for a living?

A. Miner.

Q. How long have you followed mining?

A. Oh, about something like thirty years, a little more.

Q. You were in the employ of the defendant in this case?

A. Yes sir.

Q. As a miner?

A. Yes sir.

Q. On or about the 4th of August, in the year 1914, were you in the employ of the defendant at that time?

A. Yes sir.

Q. In what capacity?

A. As a timberman.

The Court:

Q. Timberman in a mine?

A. Yes sir.

Mr. Kearney:

Q. What mine, do you remember?

A. The Humboldt of the Arizona Copper Company.

Q. Was that underground or what?

A. Underground, yes.

Q. About what depth?

A. About twenty-five or thirty feet.

Q. Were you running a tunnel at that time?

A. Yes sir, repairing it.

Q. And what did the defendant company pay you as wages for your work?

A. Forty-seven cents an hour for seven and one-half hours.

Q. Do you know what the usual wages of a miner are for doing this work that you were doing at that time?

A. Well, a timberman about three and one-half a day, I presume, three-forty or something like that—difference in prices.

Q. At this time did you receive an injury in the mine?

A. I received in the mine?

Q. Did you receive an injury in the mine?

A. Yes sir; on or about the 4th of August.

Q. Now, how did that injury happen?

A. We were taking out old timbers and putting in new and raising the roof—making the tunnel higher. In order to do that we had to take down some ground to get in the new timbers. We put in another post, and we worked all the shift at that—got it about completed—well, it was completed. And about half an hour
32 before quitting time I was hit with this rock. I would like to show the jury,

Q. Sure, come forward here and show the jury.

A. Here is—when we got through——

The Court: You had better turn around.

The Witness: I want to explain myself against this wall.

Mr. Kearney: Go ahead.

A. And when we just about got through I felt quite satisfied with my day's work, and made a remark to my partner——

Q. No, never mind the remark, but just tell what happened to you there.

A. Well, I got struck. I looked at the work and was satisfied with it, and turned around right in this manner, (illustrating) or was turning facing my work in this way (illustrating) and turned around like this (indicating) to go towards him—he was about four or five feet that way (indicating), to go to him and this here rock fell out of the side and struck me on the head. In the meantime I was dazed and just turned around a little to the right. There is a cross-cut there, what they call the cross-cut, and I was knocked dazed, turned right around and fell over in that direction, and he came to my assistance.

Q. You need not state what he said.

A. He came to my assistance and picked me up and took me towards the—an old post that had been took out previous. As near as I can remember, he put me there to sit down. He examined my head and asked me if I was——

Q. Never mind what he asked you. Just state what happened to you there.

A. Well, I went to sit down, and I was dazed and knocked out. He wanted to take me home, and I says, "I will wait now." I said "The shift is pretty near through."

Q. Never mind what you said to him.

A. In around about a half an hour, and I stayed there.

Q. Do you know what hit you on the head?

A. Yes sir; a rock struck me.

Q. Now state the condition of that mine. Did you have to use candles to light your way in there?
A. Yes sir.
Q. And the only light you had was each one a candle?
A. Just my candle.
Q. No, other light in the mine?
A. No sir.
Q. Then after that did you do any other work or not there?
A. I did, I followed my employment up until the 18th.
Q. Never mind, what you told.
The Court: He said he followed his employment up to the 18th.
The Witness: Yes.

Mr. Kearney:

Q. Followed your employment up to the 18th?
A. Yes.
Q. The 18th of what month?
A. Of August.
Q. Then where did you go after that?
A. I went to the hospital.
Q. At Morenci?
A. Yes sir.
33 Q. How long did you stay at the hospital?
A. Not long that time. I went home after that.

The Court:

Q. How long, while you are on that point, how long?

Mr. Kearney:

Q. About how long were you in the hospital in Morenci?
A. At that time just about an hour or so, I guess.
Q. Well, take all the time together.
A. Oh, I was in the hospital a week or ten days altogether.
Q. Then where did you go to from there, Mr. Bray?
A. I went to Salt Lake City.
Q. What was your object in going to Salt Lake City?
A. To be treated and get in closer connection with my lodge-, the Odd Fellows and Knights of Pythias.
Q. What money were you out on your trip from Morenci to Salt Lake City?
A. About $150 as near as I could judge, $200, something in that matter.
Q. About $200?
A. Yes sir.
Q. Did you pay that much in going up there?
A. No sir; the Odd Fellows gave me $100.
Q. And where did the other fund come from?
A. And the Knights of Pythias.

Mr. Elliott: If the Court please, we will ask that that evidence be stricken out.

The Court: It may be stricken out. What the lodge gave him is stricken out.

Mr. Kearney:

Q. Now, what is your condition, or what was it when you went to Salt Lake City?

A. Well, I couldn't hardly walk, and dizzy. I had to be led.

Q. What was the nature of the difficulty, Mr. Bray?

A. Well, my legs was stiff and I had to just pull them right around—catch hold—if I had to stand or walk in any way I had to pull myself—cat*hc* hold of anything that was in my reach and pull myself over. That is the only way I could get around.

Q. When did this trouble first come on you?

A. Why, several days after the accident I began to get dizzy.

Q. Come on you gradually?

A. Yes sir.

Q. And then did it continue to get worse?

A. Yes sir.

Q. State what particular effect it had upon your walking or moving?

A. Well, I couldn't hardly get around. I don't know what the reason was. I was affected by the blow—my whole system, and I couldn't walk, I couldn't eat nor sleep.

Q. What did you do at Salt Lake City? Did you have to go to the hospital there or not?

A. Yes sir; to the Holy Cross.

Q. Any physician there operate on you?

A. Yes sir.

Q. Who was that?

A. Doctor Root and several assistants. I suppose they were assistants.

Q. They performed an operation on you, you say?

A. Yes sir.

34 Q. How long were you in the hospital there?

A. I went in the hospital the 23rd of October, and came out I believe it was the 6th or 7th of November.

*A*. 1914?

A. 1914, yes sir.

Q. After you came out of the hospital what change did you notice in your condition, if any?

A. Why, after I got out of the hospital, when I got to moving around, I could walk better considerable, but my system, all the time when I come to touch anything or push, or anything, why, there was something run through my system, and all the time go to the head where I was operated on.

Q. And how does that injury affect you now?

A. Just the same.

Q. In what particular way? Explain to the jury.

A. Why, if I lift at anything, or use the pick, or anything like that—pull—why, it all goes right there (indicating) to the head. In the mornings, when I get out in the morning there is a tendency

that something is pulling me, that I couldn't walk as I ought to walk. It keeps a dragging.

Q. Have you been able since that time to do any manual labor?

A. Well, all I have done is work in the city park a few shifts, a few days; that is all.

Juror Anderson: I did not understand the last answer.

The Witness: I said I just worked a few days in the city park since the accident.

Mr. Kearney:

Q. My. Bray, before this injury did you ever habe any sickness?

A. No sir.

Q. Did you ever have any ear troubles?

A. No sir.

Q. Did you ever suffer any accident of any kind?

A. No sir.

Q. Now for a number of years prior to this had you at any time had any injury at all or illness of any kind?

A. No sir; no, not an injury. I would state that when I was about sixteen or seventeen years of age in the mine, in England, I fell in a ladderway, but I couldn't have been very badly hurt at that time because I walked pretty near four or five miles to my home. And that is the only—if you call it an accident.

Q. At that time did it injure your head any?

A. No sir.

Q. Your head did not hit against anything that time?

A. No sir.

Q. You have had no illness of any kind?

A. Never; no sir.

Q. For a number of years prior to this injury?

A. No sir.

Q. Always able to report for your work?

A. Yes sir; of course, I have had a cold; I have had a cold — like, nature calls, or a bilious attach; that is all. But never sick.

Q. You say you had an operation performed on your head. Come over here. Now, where was that operation performed on your head?

A. Right here (indicating).

Mr. Kearney: You gentlemen will observe in here the hollow of the head. There is a depression here. That is where the
35 operation was performed. Any of you wish to examine it?

Juror Haskins: No, I can see that there is a depression there.

Mr. Kearney:

Q. Now, I wish you would tell the jury how you first noticed this dizziness or staggering, that time—what effect it had upon you.

A. Well, when it started in, in the first place, I was just the same as a drunken man, and I was all the time—me head would go faster than me legs, and all the time go towards the left-hand side. I had a tendency to go away that way (indicating) all the time. But

me head would always seem to want to be first, and I couldn't hold me head up this way, as I am doing now: I just looked down on the ground.

Q. Did that gradually get worse until you were operated upon?
A. That gradually got worse until I was operated upon; yes sir.

Mr. Kearney: You may cross examine*d*.

Juror Haskins: I would like to ask the witness one question.

Q. Why is it that you did not continue in employment for the city in the city park. You said you worked two or three days.
A. I worked a few days. Why, they laid off the men. Winter time, you know—you see, they laid them off.

The Court:

Q. Where was that park, what place?
A. Liberty Park in Salt Lake City.
Q. Salt Lake City?
A. Yes sir.
Q. How many days did you work there?
A. I worked at one time from twelve to fifteen days. I was laid off with a crowd, and then I went to work again something like a month or so after and worked eleven days.
Q. What kind of work did you do?
A. Oh, just scraping up leaves and cleaning up.

The Court: Go ahead and cross examine.

Cross-examination:

By Mr. Elliott:

Q. How do you fix the date of this injury as the 4th of August, 1914, Mr. Bray?
A. I said from the 1st to the 4th.
Q. It may have been prior to the 4th; it may have been a few days prior to the 4th?
A. Yes, it was up around that time.
Q. You received your injury from the 1st to the 4th of August?
A. Yes sir; leaving out a Sunday.
Q. That is, you worked a period of at least fourteen days and probably fifteen or sixteen days after you received your injury?
A. Yes.
*A*. That is true?
A. Yes sir.
Q. That is a positive fact?
A. Well, I don't remember losing any time.
36 Q. Well, that period intervening of fourteen or fifteen or sixteen days from the date of your injury until the time you quit work for the Arizona Copper Company at Morenci?
A. What is that question?
(Question read.)
A. Well, I worked after I got injured until the eighteenth.
Q. Did you report that injury to your shift boss?

A. Not at that time. I did when I went to work on the eighteenth, on the morning of the eighteenth I told him that I wasn't feeling well, I said to my shift boss; and he said "Well, if you aren't feeling well, you can lay off." "Well," I said, "I would like to try for awhile." "Well," he said, "All right." So I went up and tried it until nine o'clock and at nine o'clock I came home on the morning of the eighteenth.

Q. That was the day you quit work?

A. That is the day I quit.

Q. What was the name of that shift boss, Mr. Bray?

A. Richard Williams.

Q. Who was working with you at the time of your injury?

A. Noah Green.

Q. How far was Noah Green standing from you at the time this rock struck you on the head?

A. About four or five feet, as near as I can tell.

Q. You stated that this injury which you claim was caused by the falling of the rock upon your head occurred just prior to the closing of your shift for that day.

A. Yes sir.

A. What time did you- shift close?

A. Why, 4:30, I believe; I am not positive.

Q. You would put the injury then somewhere about four o'clock between four and four-thirty?

A. I was injured somewhere about that time, just about a half an hour previous to quiting, as near as I can tell. Of course, my memory might not be so good now as it was then.

Q. Was your deposition taken in Salt Lake City, Utah, on the 4th day of October, 1915, before one J. S. Farrington, a Notary Public, and in the office of G. W. Sullivan, who was acting as your attorney?

A. It was, I couldn't tell the date now.

Q. About that time?

A. Yes sir.

Q. It was so taken?

A. Somewhere about that time.

Q. You answered questions that were propounded to you there, answered questions under oath?

A. Mr. Sullivan, I presume——

Q. I say, did you answer questions?

A. Yes, I answered questions, certainly.

Q. Under oath that were propounded to you there?

A. Yes, I answered questions.

Mr. Elliott: Mr. Clerk, has that deposition been opened yet?

The Court: You may open the deposition, Mr. Clerk.

Mr. Elliott:

Q. Mr. Bray, did you or did you not report the fact of your injury to Richard Williams, your shift boss, on the 18th of August 1914, the day on which you quit work?

A. I did not.

37 Mr. Kearney: I object to that as not cross examination.
The Court: Objection overruled.

Mr. Elliott:

Q. You reported your injury?
A. No sir, none whatever.
Q. Now, I will ask you if it is not a fact that at the taking of this deposition in Salt Lake City on the 4th day of October, 1915, this question was asked you: "What was the name of the shift boss to whom you reported your injury," and you answered, "Richard Williams"?
A. Yes.
Q. Is not that answer true?
A. Yes sir.
Q. Then you did report——
A. I reported to Richard Williams when I told him I was sick and wanted a lay-off this morning, particularly, the eighteenth.
Q. Did you report your injury?
A. No, sir; I told him I was sick.
Q. Then is or is not your answer to that interrogatory which was propounded to you in Salt Lake City, namely, "What was the name of the shift boss to whom you reported the injury," and you answered, "Richard Williams"—is that answer true or untrue?

Mr. Kearney: I object.
The Court: Objection overruled.

A. Yes, I reported. I reported to Williams that I was sick, and I wished to go home, but I would try to work if it was possible; that I didn't want to lay off. And he said "all right, try it." And I went up and stayed there until nine o'clock and went home.

Mr. Elliott:

Q. I will ask you if it is not a fact that in testifying in that deposition in Salt Lake City you did not state that you did report your injury to Richard Williams on the 18th of August, 1914, the day you quit working?
A. I don't remember it sir; I don't remember such.
Q. You may or may not have said it?
A. Well, I may or may not.
Q. If you said it was it true?
A. If I said it, it was all right.
Q. And it was true?
A. It is true if I said it, bit I don't think I said it; I am pretty sure.
Q. On page 28 of this deposition, the second question appearing upon that page: "What was the name of the shift boss to whom you reported your injury," and your answer to that as stated here is "Richard Williams." Is that answer true?
A. I guess it is. If it is there, it is all right. Of course, I wouldn't be positive. I suppose it is all right.
Q. Then which is true, you- statement in Salt Lake City that you

did report your injury to Richard Williams, your shift boss, on the 18th of August, 1914, or your statement made here today that you did not so report your injury?

A. I told you——

Mr. Kearney: I object to the form of the question as repetition and it has been answered several times.

The Court: Objection overruled. Answer.

38 A. I told you that I reported that I was sick.

Mr. Elliott: I ask you which is true. Answer the question, please.

Mr. Kearney: Now, if the Court please, if it is true that he reported his injuries,—isn't that reporting his injuries if he is telling him he is sick?

The Court: That is a matter for argument.

Mr. Kearney: And then follow the witness up and ask him which is true and which is false. I don't think it is a proper method of cross examination.

The Court: Objection overruled. Now, you may explain to him what you mean by asking which is true.

Mr. Elliott: Which statement is true, the statement that you did report your injury or the statement that you did not report your injury to the shift boss?

Mr. Kearney: I object to that.

The Court: On the 18th day of August.

Mr. Elliott:

Q. On the 18th day of August, 1914, the day on which you say you quit work?

A. Well, if I said it, I have already said it, so there is nothing to it.

Q. You won't say which is true?

A. I will tell you, I don't remember such a business put to me right now. I am just telling you as a gentleman that I reported when I wanted to *ho hime* this morning of the 18th that I was sick, that I wasn't well enough, or didn't feel well enough. And he says, "Well, go home." And then I told him that I would like to work and try myself, and I will go up, meaning I will go up to the tunnel. And he said "All right."

Q. Yes, you have gone all over that ground before. Then you remembered in Salt Lake City that you told your shift boss on the 18th day of August, 1914, that you had received an injury and today you don't remember that you told him that you had received an injury on that day?

A. Well, I can't say that I put it in that way.

Q. You don't remember it then.

The Court: No, he says he can't say that he put it in that way.

The Witness: My meaning is the same as I have just explained myself, that I went to him and reported.

The Court: No, he is asking you about what you testified in Salt Lake City.

The Witness: Yes, certainly, I understand.

Mr. Elliott:

Q. Did that rock knock you down.

A. Yes sir.

Q. Render you unconscious?

A. I turned around and I got dazed, and I don't know what you might call it.

39 Q. Did that rock knock you down, Mr. Bray?

A. Yes, I fell down, anyhow, I guess it knocked me down.

Q. Did it render you unconscious?

A. Yes sir.

Q. Did it cut your scalp?

A. Yes sir; in two places.

Q. Was there any blood from a scalp wound?

A. Yes sir; there was blood.

Q. Did Noah Green notice or make any remark about the presence of blood from that wound in your scalp?

Mr. Kearney: I object to that. There was nothing brought out on direct examination about that.

Mr. Elliott: He testified that Mr. Green was present there and saw the wound, the blood from the wound.

The Court: Yes, he also said that Mr. Green took hold of him. I think that is within the rule. Objection overruled.

(Question read.)

A. Yes sir.

Mr. Elliott:

Q. What did he say about it?

A. He said it was cut, and when I was sitting down he stood in front of me and examined my head.

Q. He examined your head?

A. Yes sir.

Q. And said he saw the blood coming from the wound in your scalp?

A. And he wanted to take me right home, take me right out, and I said, "no, I will wait awhile. The shift is pretty near up." And I says, "I will sit here and rest."

Q. Did he want to take you to the hospital?

A. No, he wanted to take me home.

Q. How long were you unconscious?

A. Oh, I couldn't say. I couldn't say that; probably a few minutes, five or ten minutes, or five minutes. It might be less or more; I couldn't say. I was in a dazed condition.

Q. But you weren't down and out on the ground, unconscious from that blow?

A. Yes sir; I suppose I was. I didn't get any blow anywhere else.

Q. What was the weight of that rock? What was the size of that rock that struck you on the head?

A. Well, it is guessing with me, because I wasn't looking right at the rock when it fell. I was sideways, and I couldn't say. It is just merely a guess; that is all, on my part.

Q. Was it as big as your fist or as big as you- head, or as big as one of those chairs there.

A. Well, I don't know. It might be bigger. It is only a guess.

Q. Now, I will ask you if it is not a fact that upon the taking of your deposition in Salt Lake City on the 4th of October, you testified that that rock was nine inches wide by about eighteen or twenty-four inches long—not specifying how thick it was—but stating that it weighed probably forty-five or fifty pounds.

A. Well, that was just through your talking; that is all. I don't know how big the rock was.

Q. How is it through my talking? You answered the question and you stated that.

40 A. Well, that is what I said. I don't know how big the rock is because I wasn't looking at it. When a man is sideways he can't tell how big that rock was. He ain't looking there. If I was, it would probably hit me in the face.

Q. I ask you now, and you can answer this question "yes" or "no."

A. Yes, I made that statement, yes, and it is only a guess at that.

Q. Is is true that that rock was that size, or is it not?

A. No, I don't say it is true, because I don't know. It is only a matter of guessing with me on the size of the rock.

Q. What was the nature of that injury that you have detailed here that you received when you were about sixteen years of age by falling down a ladderway, as I understand?

A. What was the nature?

Q. Yes.

A. Well, I just fell.

Q. How far did you fall?

A. Well, I couldn't tell now exactly.

Q. You fell, though?

A. What?

Q. Did you fall down or up?

A. I fell up, or down. I didn't fall up; that is a cinch.

Q. How far did you fall?

A. Oh, I couldn't say now—two or three ladders; I don't know just what distance.

Q. Two or three ladders?

A. Yes, short ladders.

Q. How long were the ladders?

A. Oh, I don't remember; probably five or six feet long. They might have been ten; I don't know. It is so long ago that I don't remember.

Q. How did you happen to fall?

A. I was packing a can of water and climbing with one hand.

Q. Now, when you say you fell a distance of three ladders——
A. Well, three or four.
Q. —each ladder six feet long or more——
A. Well, something like that.
Q. —nine feet, eighteen feet, now is my talking compelling you to say that?
A. What?
Q. Is my talking getting you to say that you fell that distance?
A. No, I don't know how far I fell, I say.
Q. Where did you land? How did you fall; on what part of your body did you strike?
A. I lit on me feet and fell over.
Q. Fell over on your side?
A. Onto the right as near as I can tell. I can't tell that; it is so long ago. I was only a kid then.
Q. Did you strike your head?
A. No.
Q. What part of your body did you strike when you fell over?
A. Well, just with my arm, just on the sideways, as near as I can tell; I don't remember much about that. I couldn't be very much hurt when I walked four or five miles.
Q. Mr. Bray, how long have you been mining?
A. About thirty years, a little over, I guess; since I was fourteen.
Q. Where did you start in?
A. In England.
Q. In your experience in mining covering that period have you ever received any injuries at all to your head?
A. Well, not of any consequence. I wouldn't——
Q. You have received injuries to your head?
A. Well, I might have been touched, but I don't know as I have.
41 Q. How long were you in the hospital at Morenci?
A. About a week or ten days, I should judge.
Q. Do you know Doctor Goodrich of Morenci?
A. Yes.
Q. Doctor Goodrich examined your head?
A. I believe he did.
Q. Well, did he or didn't he?
A. Well, he did.
Q. Doctor Goodrich asked you how you got hurt?

Mr. Curley: I object to that, if your Honor please,—any communication——

Mr. Elliott: I assume he can answer how he got hurt. He can answer that "yes" or "no".

Mr. Curley: I object to any communication between the Doctor and the witness. Doctor Goodrich was waiting upon him at the time.

The Court: Because it is confidential?

Mr. Curley: Because it is confidential. If your Honor please, this question was up——

The Court: I am familiar with the law of the case, Mr. Curley. All I want to know is whether or not this physician was attending him at the time.

Mr. Curley: At the time. He was there for that purpose.

The Witness: Yes, I was paying a dollar, eighty-five a month for that treatment.

Mr. Curley: We object to any conversation or anything that occurred—anything that Mr. Bray said or anything that the Doctor said.

Mr. Elliott: The question, though, your Honor, is simply this: did the Doctor ask him such a thing.

The Court: Well, that is the very thing that a doctor does ask a man when he treats him. He first wants to know what the patient has to say about his condition, and then he proceeds in a professional way to make the examination. Now, all that occurred between the doctor and this witness was confidential, as I understand it, and on their objection will be excluded. I sustain the objection.

Mr. Elliott:

Q. How soon after your injury, Mr. Bray, you claimed injury——

A. What is that, sir?

Q. I say how soon after your claimed injury did this dizziness begin?

A. Well, as near as I could tell, about a few days after. It might have been a week. I wouldn't be positive. It wasn't long. It was a short period.

Q. As a matter of fact, didn't you state in taking your deposition in Salt Lake City that that dizziness began immediately at the time and after, following that injury; that when you regained consciousness you were dizzy, and you were dizzy from that time up to the time of your operation?

42 A. I was dizzy then, too. What I mean is when the thing started to work on me so that I couldn't get around to be able to walk. It was several days before I began to get in that condition, that I began to fall into the left hand—all the time fall into the left hand side.

Q. That is your explanation of it?

A. Yes, sir.

Q. Now, Mr. Bray, will you please show or demonstrate to the jury the point on your head where that rock hit you?

A. What part of the head?

Q. Yes.

A. Right there (indicating).

Q. The left-hand side of the head above the ear?

A. Right there, sir.

The Court: At that point there (indicating).

A. Yes.

Q. Is there any scar?

A. Well, I don't know. I can't see it myself.

Q. Where was the operation?

A. Right here (indicating).

Mr. Elliott:

Q. And at this point, on the left-hand side of your head right above your ear?

A. Right here (indicating).

Q. You were struck with this rock and that is where your scalp was cut?

A. Yes, right across here, in this direction, and down.

Q. The scalp was cut how far?

A. Oh, I couldn't tell you how far; I don't know that.

Q. But there was enough direction to that cut in your scalp so that you could say it was in this direction and then down?

A. Well, that is the operation you are talking about, ain't it?

Q. I am talking about the cut which you say you received on your scalp from the rock.

A. Oh, no—the cut—why, the cut was right there, (indicating). There was two——

Q. Two cuts?

A. Yes.

Q. And the blood flowing from them?

A. Yes, sir.

(Juror Haskins examined that portion of the plaintiff's head, indicated by him.)

Mr. McFarland: If the Court please, may the other jurors, if they like, examine*d* Mr. Bray's head?

The Court: Oh, yes, anybody that desires to do so, may.

(Juror Dolan examined that portion of the plaintiff's head, indicated by him).

Mr. McFarland: Is there any other juror who would like to examine*d* Mr. Brady's head?

The Court: Proceed.

Mr. Elliott: You stated, Mr. Brady, on your direct examination——

The Court: I cannot hear you, Mr. Elliott.

Mr. Elliott:

Q. You stated, Mr. Brady, on your direct examination, I believe, that you had worked at the city park in Salt Lake City over two different perio-s, and at the end of the first period you were
43 laid off.

A. Yes.

Q. With a gang of men?

A. Yes.

Q. Now -ere you fired the second time you went back to work, or did you lay off?

A. We were all fired.

Q. You were all fired?

A. Yes.

Q. You weren't singled out on account of any incapacity?

A. Well, I couldn't say.

Q. You were all fi*f*ed together?

A. I don't know about that. I am not able to state that question,—or that answer, rather.

Q. I am asking you if you were.

A. I couldn't say.

Q. I am asking you is you were singled out and discharged or whether you were turned loose with a number of other persons working at the park?

A. There were several others.

Q. Several others turned loose?

A. Yes.

Q. How much were you making a day up there?

A. Two and one-quarter.

Q. Now, you have stated that your expenses from Morenci to Salt Lake City were in the neighborhood of $150.

A. Yes, somewheres.

Q. Did that include your wife's expenses also?

A. Yes sir.

Q. She went with you?

A. Yes and family.

Q. Now was any part of that $150 paid out of your own private pocket?

Mr. Curley: I object to that if your Honor please. Upon motion awhile ago the answer was stricken out as to where the money came from. I don't imagine that is material, where it came from.

The Court: Well, that portion that was paid for his own expenses is material, but what was paid, what amount was paid for his wife and his family, as he testified, I think is immaterial.

Mr. Curley: Yes, but that isn't the question. The question here is what part of that was paid out of your own pocket. Mr. Bray testified awhile ago that he got certain of this money that he had spent on this trip from certain orders, and upon motion that was stricken out. In view of that ruling I think it would be improper to ask him at this time what portion was paid from his own pocket.

Mr. Elliott: The purpose of that is that he stated that certain of this money that he had came from these lodges, and we asked that that be stricken out, and the court granted our request. Now there may be other of that money which he says he expended on his expenses to Salt Lake City, and we would like to know if any of that is chargeable from his own pocket, whether he had to put it up, or whether it was given to him by somebody.

The Court: It does not make any difference, as I take it, whether the lodge gave it to him or whether it was individual money. If he spent that much money on the trip, and the jury come to the conclusion that that trip was a necessary one, would it not be recoverable?

44 Mr. Elliott: I should think not, your Honor.

The Court: If he sustained injuries and the company is liable? Of course, the question of the company's liability is yet to be determined. But should the jury find that the company is liable and that the accident was not due to his own negligence, then the question of compensation arises, and if any lodge furnished the money

which he used in the payment of medical bills, doctor's bills, or any necessary expense, then I think he should recover that just as much as he might recover it if he had paid it out of his own pocket. I do not know of any rule of law to the contrary, and with the light which I now have on the subject, I shall so charge the jury. It will be necessary for him to state what amount was paid for himself and what amount was paid for his family, because the entire $150, so the witness testifies, was used in payment of his expenses and those of his wife and family. Now what he paid for the expense of his wife and family is not recoverable. If the company is liable for anything at all, it is not liable for that.

Mr. Curley: We will agree upon that.

Mr. Elliott:

Q. Mr. Bray, will you describe your condition at the present time in respect to being better or worse that it was at the time you were working at the city park in Salt Lake City.

A. Well, I am just about the same. Sometimes I feel pretty fair, and then ag-in I fall away. I ain't very good.

Q. What do you say with respect to your ability to take long walks?

A. Well, if you would give me time, I might walk from here to Morenci.

Q. You could do that, could you?

A. Well, I don't know as I could, but if I had time——

Q. You could do it?

A. Probably it would take me two or three months.

Q. Did you have any difficulty in navigating about the crowded streets of the City of Salt Lake?

A. Just the same as I told you before, about in the mornings. I am worse in the morning when I get up out of bed than I am any other part of the day. There seems to be something in me system that is pulling me back. Sometimes I walk fine. Other times, again, I am not so good,

Q. How is your weight at the present time; how does it compare with your weight as you would put it normally?

A. Well, when I was hurt, up to that time I weighed 167 pounds, 168, and today I am 153, '3 or '4; probably 155.

Q. Did you get weighed?

A. No sir.

Q. When did you weigh last?

A. Why, I weighed here a day or two ago.

Q. Have you had any epileptic tendencies develop in you as yet; that is, any fits?

A. Fits?

Q. Yes.

A. No, I don't think I have got any fits. I hope not.

Q. You never have had any fits?

A. I hope not.

Mr. Elliott: That is all.

45 Redirect examination.

By Mr. Kearney:

Q. At the time this rock fell on your head, were you wearing a hat?

A. How is that?

Q. At the time this rock fell on your head, were you wearing a hat?

A. Yes sir.

Q. How was your hair then, short or long?

A. It was long.

Q. In that operation was the skin on your head cut and laid back?

A. Yes, the scalp was all cut back here, turned over.

Mr. Elliott: I move the court to strike out that answer. I rather suspect the witness here was under the influence of an aenestheic at the time that operation was performed.

The Court: I cannot hear you.

Mr. Elliott: I say I move to strike out the witness's description about how his scalp was cut back at the time of his operation, because I rather suspect he was under the influence of an aenesthetic.

The Court: Well, I suppose the witness knows what he is talking about. If you don't know of your own knowledge, don't state it.

The Witness: Of course, the doctor told me.

The Court: Well, don't tell what the doctor told you. You are testifying now. Tell matters that are within your own knowledge.

The Witness: I don't know it myself positive.

The Court: Very well, answer it that way.

The Witness: That is what I say.

Mr. Kearney:

Q. State whether or not you experienced any particular headache.

A. Headache.

Q. Yes.

A. No, not particularly

Q. Was it mostly in the form of dizziness?

A. Yes.

Q. Staggering?

A. Yes sir.

Juror Moore: What was the question, please, prior to this last one. I did not hear it.

The Court: Whether he experienced any headaches.

Juror Moore: Headaches?

The Court: Yes.

Mr. Curley: He said "no."

Juror Anderson: One question, if your Honor please, that hasn't been brought out.

46 Q. How far did this rock fall from the top of this tunnel before it struck you?

A. Well, it didn't—it didn't fall from the top. As I showed you just now, it fell off of the side, and close to the roof, as near as I can tell. I couldn't tell within a few inches. Probably it might have been three feet; it might have been four. It might have been more or less; I couldn't say positive.

Mr. Kearney: That is all.

The Court:

Q. How near were you to the side of the tunnel when the rock struck you?

A. Right close, sir; right close to the side.

Q. Did you not look to see where the rock had fallen from?

A. Why, I didn't have no chance to look sir.

Q. Were there other rocks along there on the floor?

A. Yes sir.

Q. Of the tunnel?

A. Yes, I was standing on loose dirt.

Q. Loose dirt?

A. Yes, I was on the rill of the pile, you see.

Q. You say you were unconscious a few minutes?

A. Yes.

Q. Well, then, did you go back to look, to see what had struck you?

A. No sir; no sir.

Q. Why didn't you?

A. I knew what struck me all right.

Q. Did you look to see what the size of the rock was?

A. No, it broke up, all broke up. It was a kind of soft, porphyry nature of ground. It broke.

Q. When it struck the ground did it go to pieces?

A. Yes sir.

Q. Could you estimate how far from the surface of the tunnel the rock came?

A. Well, I am just saying, I should judge, it probably three or four feet.

Q. How high was the tunnel from the top of your head?

A. Well, when I was on the rill of the pile, that is just about the distance, three or four feet high. It might have been an inch or two more or less. I couldn't tell exactly because I never measured it.

Q. Well, then, how could the rock fall from the side?

A. Well, you see, it fell from the side of the drift.

Q. What were you doing at the time?

A. I was just quitting; just through with my shift's work.

Q. Were you standing up within two or three feet from the side of the tunnel?

A. Yes, two or three feet off of the level. I would like to explain it to you. You see, this here (indicating) is the side of the tunnel, this board. I am standing like this here is right now, and I gets around, and turned around to the left, you see, and gets on the rill of the pile going toward the outside, and this rock fell from up in this direction, on the side and up, you know. See?

Q. Had you been working up there?
A. Working right in this roof, changing the timbers.

The Court: That is all. Call your next witness.

47 Mr. Elliott: May I be permitted to ask the witness a question?

Q. I will ask you, as a matter of fact, if you did not state at the taking of this deposition in Salt Lake City that that rock fell a distance of four or five feet and struck you on the head?
A. Yes, it might be that, the same as I say now. I can't tell within an inch or two.
Q. I will ask you if you did not so state. Answer that "yes" or "no."

The Court: He said he did.

The Witness: Yes, I did, yes, certainly. That is all right.

Mr. Elliott:

Q. I will ask you further if at Salt Lake City at the taking of this deposition you weren't asked how large was this rock that hit you, and if you did not reply, "well probably eighteen inches or two feet long, and probably eight or nine inches thick. It was quite a rock. You may know, a man the way I was standing, my eyes might deceive me. It might be bigger; it might be smaller." "What was the approximate weight of that rock, forty-five or fifty pounds, nine inches by eighteen inches?" Well, it must have been that, forty or fifty pounds; somewheres around there."
A. Well, it is just the same as I tell you now; I can't tell.
Q. Now, you said here that that rock was broken to pieces when it hit your head. How did you make such an estimate as that in Salt Lake?
A. When it fell on the ground, I can't tell because I wasn't looking at it. I don't know what size it was.

Mr. Elliott: That is all.

Juror Haskins:

Q. Could you tell whether there was more than one rock fell at that time?
A. Yes, there was more than one.
Q. Quite a lot of stuff came down?
A. Yes, quite a bit.
Q. You don't know which rock hit you or whether it was a number of rocks?
A. No, I know there was quite a bit of dirt fell there. I don't know which rock hit me, or nothing at all. I knew that I was hit and that is all.

The Court: That is all.
Mr. Kearney: That is all.
Mr. Curley: Gentlemen of the jury, I will not read to you the deposition of Doctor E. F. Root.

The Court: How long is that deposition?

Mr. Curley: Why, it extends from page 43 to page 91.

The Court: Are there any objections to the questions and answers?

Mr. Elliott: There are a few objections interspersed
48 through it, your Honor. There are not many.

The Court: Very well, read for half an hour.

Mr. Curley (reading): Doctor E. F. Root, a witness produced on behalf of the plaintiff, being first duly sworn testified as follows:"

* * * * * * *

(Q. Did you receive any communication from a Doctor Goodrich of Morenci, Arizona, concerning him about the time you called on him, or before, or immediately after?")

Mr. Elliott: That objection is withdrawn there. We admit in that connection that he had a letter from Doctor Goodrich.

Mr. Curley: That is immaterial, anyway.

Mr. Elliott: That is immaterial.

("Q. What, if any, other doctor did you call to consult with you concerning Mr. Bray? * * *

Q. Now, what conclusion did you and Doctor Ewing reach, assuming that you reached some conclusion, as to the nature of his ailment, and the remedy for it?")

Mr. Elliott: I object to anything that Doctor Brown said, if your honor please, in the absence of the defendant.

The Court: Doctor Brown?

Mr. Elliott: I think his name is "Brown".

The Court: "Ewing".

Mr. Curley: He goes on to say that "we reached" a certain conclusion. There was no objection interposed to this at the hearing.

The Court: Well, they may object now. I do not see how it can well be separated. I think the objection is a good one, that one doctor may not quote another doctor, or may not tell at what conclusion the other doctor arrived, but the question is how it can be separated.

Mr. Curley: He couldn't state what conclusion that Doctor Ewing stated here, without separating it from the conclusion that Doctor Ewing arrived at.

The Court: Well, would it not be your business to separate it so that the statement of the conclusion of your doctor would be competent?

Mr. Curley: Well, that is Doctor Root's conclusion.

The Court: Well, it will be admitted simply as the conclusion of Doctor Root, and his statement with reference to any conclu-
49 sion that Doctor Ewing reached will be excluded.

Mr. Curley: We have no objection to that, your Honor.

The Court: Instead of reading "we", read "I".

Mr. Curley: The answer then would be, "I concluded that there was a great deal of pressure on the brain, bringing about these symptoms, and that it was either a tumor or abscess, with a very strong

probability of abscess. My conclusion was that the pressure was in or about the cerebellum, the lower part of the base of the brain."

* * * * * * *

("Q. You may state what in your judgment was the cause of the man's nervous disorder and his inability to walk?

A. Why, I attributed his inability to work entirely to the pressure on the cerebellum.")

The Court: "To work," or "to walk"?

Mr. Curley: The question was his inability to walk, and the answer is—I don't know whether the stenographer made a mistake in that or not, but the answer is "Why, I attributed his inability to work entirely to the pressure on the cerebellum."

("Q. What would you expect the result to be, or how would he be effected if he should undertake to do the work of the average—the average work of the average miner: that is in what would his failure to do that work first manifest itself?")

Mr. Elliott: We renew our objection there on the ground that the doctor has not qualified, as to mining work. He has no knowledge of mining conditions at all.

Mr. Curley: Mr. Sullivan says, "Will you change the word "miner" to "laborer" and in that way avoid the objection. And then Mr. Elliott says, "I will renew the objection."

The Court: Objection overruled.

Mr. Curley (reading): (A. Well, in the first place, after a severe illness and injury and operation there is so much weakening—letting down of the whole tissue, that I wouldn't expect him to be able to do that heavy work. * * * I mean the possible re-forming of an abscess."

* * * * * * *

"Q. I want you to state, Doctor, whether or not you have ever received any compensation for your services in this matter.")

Mr. Elliott: The objection is withdrawn.

Mr. Curley (reading): (Q. "Then, will you confine your answer to your services, and Doctor Evans and Doctor Galligan.")

50 Mr. McFarland: If the Court please, that is immaterial what other doctors would charge, and what they would do in such a situation.

The Court: That question is not answered.

Mr. Curley: The next question is, "I will withdraw that question and ask this question: What would you say is the reasonable value of the services rendered the patient by you and your associate doctors?"

Mr. McFarland: I object to associated, unless he knows.

Mr. Curley: That is the value of the services.

The Court: Well, if the plaintiff has not expended or contracted to expend any money, it could not be recovered; it would not be material in the case. If the doctor did not charge anything for it, you cannot allow anything for it. Without some proof that a charge was made or a liability incurred, that would be immaterial.

Mr. Kearney: I think it was the intent to state what the services rendered to him were reasonably worth.

The Court: It doesn't make any difference; if they were gratuitous, they cannot be recovered. You cannot recover something for the physician of the Order, who was doing him a kindness.

Mr. Elliott: There is no evidence here that there was any charge made.

The Court: The reason I admitted the other testimony, the testimony with reference to the amount expended, was upon the theory that the lodge gave it to the man, and the man spent it. It doesn't make any difference how he got it. If it was a gift, it was his just the same.

Mr. Curley: I understand your Honor's position.

(Q. Are you sufficiently familiar with the rules and regulations of the Holy Cross Hospital concerning its charges to enable you to state what *is* usual charges would be, and what would be the usual value of its services in caring for Mr. Bray for a period of two weeks, including the operation?")

Mr. McFarland: I object to that.

The Court: Same ruling.

Mr. Curley (reading). (A. Yes I am.

Q. Now, you may state what *is* services are worth.")

Mr. McFarland: Same objection.

The Court: Same ruling.

Mr. Curley (reading): (A. Twenty-five dollars. This was a ward case.

Q. You mean $25 a week?

51 (A. No, $25 altogether; $10 a week and $5 for the operation.")

The Court: We will suspend here, gentlemen of the jury, you will not discuss this case among yourselves nor read any newspaper accounts of the trial. Report tomorrow morning at half-past nine.

FRIDAY, Dec. 3rd, 1915—9:30 a. m.

The Court: Proceed:

Mr. Elliott: If the Court please, in this deposition, as to the cross examination of the plaintiff's witness, Doctor Root, the defendant at this time wishes to withdraw the questions appearing on his cross examination from the beginning of the cross examination on page 56 to the top of page 60. I believe there is no objection to that on the part of the plaintiff. The reason for the withdrawal is that all the questions are based upon facts that we thought had been developed in the cross examination of Mr. Bray in his deposition, but which have not been developed here at the trial, and it will be taking up the time of the court to consider the objections.

The Court: Very well, proceed.

Mr. Elliot: I now read you, gentlemen, the cross examination of Doctor Root, the direct examination of which was read to you at the conclusion yesterday afternoon.

(Reading:) (Q. Now, will you state what character of abscess you found in your operation? * * *

Q. I quote you from Osler's system, page 385, in which this statement is credited to Gower——)

Mr. Curley: I object to that statement. On his cross-examination he is reading from a medical book, and I think under the rules that is not permissible.

Mr. Elliott: He has stated his general opinion, and then fortifies that by a reference to a standard medical work.

Mr. Curley: That isn't it. The attorney is asking him, "I read you from Osler," page so-and-so. That isn't a case of fortifying his opinion. He is asking him if that is an authoritative statement.

The Court: If the book itself would not be admissible would it not be doing indirectly what you may not do directly, to permit that to be read into the record? Do you insist that that is competent?

Mr. Elliott: I don't understand you, your Honor.

The Court: Do you still insist that that is competent?

Mr. McFarland: If your Honor please, I think it is per-
52 fectly proper to call the witness's attention to a statement of an author, and ask him if that is true, is that ordinarily true. I do not think that there can be any question about quoting the statement of an author as to conditions and results. That is the way they all get their information. The author lays down a certain principle, and the fact that an excerpt is read from that author I think is one of the best evidences of fact that the proposition is true, whether it is true or false.

The Court: It is a pretty close question. Now, there was a question asked in the trial of the case the other day. You asked the witness whether or not he would regard such an author's opinion as very high authority.

Mr. Curley: Yes, that was on cross examination. The witness had made the broad statement that in recent years some authors had taken the stand that there was no connection, and upon cross examination I asked him, "Do you know the standing of Doctor Osler?" He said, "I do." "What is his standing?" "What is his standing in the medical profession?" "He stands at the head of his profession." "Doesn't he say—" That was on his cross examination, following his statements that such a contention had to a certain extent been abandoned by the men of the profession. Now this Doctor might never have had a case of this character. He may testify entirely from his learning from the books, and when they ask him, "Upon what do you base this; do you base it upon your experience?" He may say "No, I base it on my learning from the books." Then he may state to him what the author says, but he cannot read to him out of the book and say, "Do you agree with that?" I think there is no*t* doubt that the great weight of authority is that you cannot read from a book and ask him if he agrees with that. That is but an indirect manner of introducing the unverified and uncorroborated testimony of authors without the opportunity of cross examination.

The Court: Well, as I understand it, they are not by that question seeking to introduce the book in evidence, and it is not the opinion of the author that is called for. It is the statement of a witness that a statement which has been made by an author is in his judgment correct. Now it may be an indirect way of offering or asking

for testimony which is not competent, but I will reserve my ruling on that question. You may omit that question and answer for the present, and I will give you gentlemen an opportunity to look into the question.

Mr. Curley: As far as this particular question is concerned I don't care anything about it, but I don't know what may come up later on. There may be something else come up that I do care about.

The Court: Well, I am in doubt about it myself. I know that it is not proper to introduce medical books, or any excerpts from medical books, in evidence, and if I were to admit it I would not admit it as the opinion of the author of that book at all but merely as the opinion of the witness expressed in the language used by that author. However, I will reserve my ruling on the question and give you gentlemen an opportunity to look into it. Proceed with the reading.

53 Mr. Elliott: you stood in — Osler in the other case and repudiate him in this case.

Mr. Curley: No, I don't repudiate him at all. I simply object to your reading from him.

Mr. Elliott (reading): ("Does traumatism produce diseases of the brain, the cerebrum?")

The Court: You had better explain what you mean by "traumatism" to the jurors, so that they will understand as you go along.

Mr. Elliott: A traumatism, as I understand it, gentlemen, is an injury produced by force——

The Court: A blow.

Mr. Elliott: — a blow, externally, one which comes from without, and I think is a term which is generaly applied, by the medical profession, to the character of injuries which arise in industry.

(Reading:) ("A. I think primarily by weakening the tissues to such an extent that they are not able to resist or withstand the infection." * * *

"Q. I will give you a statement taken from Rose & Corless on Surgery, at page 787, as follows: 'Sometimes it (meaning the brain abscess) occurs apart from penetration, and then one can only suppose that it is due to auto-infection of the contused or lacerated area.' Does that statement explain my preceding question more fully?")

Mr. Curley: I object to the question for the same reason given in my objection to a previous question of this kind.

The Court: The ruling will be reserved.

Mr. Elliott: Would you admit the question, your Honor, for the purpose of explaining my former question?

The Court: Please mark those questions with a cross-mark to the left. You may call my attention to them again before the close of the testimony.

Mr. Elliott: We will follow down to the last question at the bottom of page 63½, the question being:

(Reading:) ("Q. In this case we are speaking of traumatic abscess entirely. We will take it for granted that it is authoritative enough.")

Mr. Curley: That follows the other. We object to that because it is based on the reading of the other portion from Rose & Corless.

Mr. Elliott (reading): ("Q. In what regions of the brain do abscesses occur with the greatest frequency? * * *

Q. Then you support this statement from Osler's System at
54 page 384, that "the history of trauma is often dubious of interpretation.'?")

Mr. Curley: The same objection.

The Court: You may pass it.

Mr. Elliott (reading): ("Q. Basing your answer on your experience as a physician and surgeon * * * to determine the cause for continued dizziness?")

Mr. Curley: I object to that. No, I will withdraw that objection.

Mr. Elliott (reading): ("Q. From your experience as a physician and surgeon, would you believe it unreasonable to deny it at such time?")

Mr. Curley: That objection is withdrawn.

Mr. Elliott: I will withdraw the next question.

(Reading:) ("Q. Would it be possible that a person who has developed brain abscess * * * determine exactly which injury produced the abscess?")

("Q. Now, Doctor, if Richard Bray, the plaintiff, in this case, had come to you first complaining of dizziness, and in examining him and questioning him, you asked him if he had received a head injury, and he denied having received a head injury, would you still have attributed the abscess to traumatic origin, or to external injury of the head?")

Mr. Curley: I object to that as not proper cross examination. There has not been any such evidence introduced upon direct examination.

The Court: Objection overruled.

Mr. Curley: If your Honor please, there is no evidence that there was any denial upon his part.

The Court: I understand. Objection overruled.

Mr. Elliott (reading): ("A. We must have a history of trauma, or evidence of trauma in some way in order to believe that it is traumatic.

Q. If a patient came to you having ear symptoms of an indefinite nature, complaining of dizziness and localized tenderness back of one of the ears, and you removed wax from that ear which caused the patient immediate temporary relief and benefit, and later an abscess of the cerebrum occurred on that side, without other apparent causes of the abscess, would you be certain that the abscess was not due to ear trouble?")

Mr. Curley: I object as not proper cross examination; not being based on anything brought out in the examination in chief.
55 The Court: Objection overruled.

Mr. Elliott (reading): ("A. I would not."

"Q. Is there such a disease as tuberculosis of the brain?" * * *

"A. Well, pain, loss of mentality.")

I think that that is wrong. It should be mobility. It does not make sense. It is an error in transcription.

Mr. Curley: Well, if that is his answer, the only thing I know to do is to read it.

The Court: It could not have been, from the very nature of things, a complete lack of mentality. He couldn't have given the information which would have enabled the physician to diagnose his case properly.

Mr. Curley: I think myself that is probably what he meant. I wasn't present at the examination.

The Court: Do you gentlemen desire it to stand as it is, or to change it?

Mr. Curley: We will change it.

Mr. Elliott: I was suggesting it in all fairness, because I was present at the examination. I have a positive recollection of it.

The Court: You may change it.

Mr. Curley: Go ahead and change it. What word did you use?

Mr. Elliott: "Mobility." (Reading:) ("A. Well, pain, loss of mobility, the chief symptoms we have from pressure; that is, focal symptoms from pressure.

Q. You were present, Doctor, during the examination of Mr. Bray, and is not his memory remarkable in the recitation of where he worked and hos long he worked in each place?")

Mr. Curley: We object to that as not a proper hypothetical question; it being a question to be determined by the jury; not proper cross examination.

The Court: Objection overruled.

Mr. Elliott (reading): ("A. Yes.")

The Court: You will remember that this witness stated that one of the symptoms of an abscess was want of the ordinary mentality, lack of——

Mr. Elliott: —co-ordination of ideas and movement.

The Court: Yes, to express it technically; that is what he said. The objection is overruled.

56 Mr. Elliott: The next question is withdrawn. I will withdraw down to the conclusion of the cross examination.

Mr. Curley: I will now read the redirect examination. (Reading.)

Mr. Elliott: Recross-examination. (Reading.)

Mr. Curley: I will next read the deposition of Dr. Brown Ewing. (Reading.) ("Dr. Brown Ewing, a witness produced on behalf of the plaintiff, being first duly sworn, testified as follows: * * *

Q. You may state in what respects the patient in your judgment will not recover the full use of his limbs and be able to do hard manual labor.")

Mr. Elliott: I object to this question, your Honor, on the ground that it is leading and suggestive. The doctor has never stated prior to this point in the evidence any probable effect on the plaintiff's legs.

The Court: What is the ground of the objection you made at the time?

Mr. Elliott: That it is suggestive and leading. The doctor has

stated generally the probable future results to the brain, and not mentioned any probable impairment of the locomotive power of his limbs.

The Court: Objection overruled.

Mr. Curley (reading): ("A. What I would expect to find there would be the continuation of the spastic condition of the muscles of the lower extremities and a liability to inflamed condition of the scar at the seat of the injury in the brain.

Q. You may state, Doctor, what was the usual value of your services rendered the patient during the year 1914.")

Mr. McFarland: We will object to that.

The Court: Objection sustained.

Mr. Curley (reading): ("Q. Dr. Ewing, I will ask you to state what was the nature of the causes of this abscess from the examination you made of the patient. * * *

A. No.")

Mr. Elliott: Cross examination. (Reading:)

("Q. Dr. Ewing, you testified, did you not * * *

Mr. Sullivan: That is all."

Mr. Curley: I will read the deposition of Dr. J. O. Evans. (Reading:) ("Dr. J. O. Evans, a witness produced on behalf of the plaintiff, being duly sworn, testified as follows: * * *

Q. Were you associated with him as a partner?

A. I was.

Q. For how long?")

Mr. McFarland: If the Court please, we think that is wholly immaterial, as to his association with another physician,
57 or his work with him. That is not expert testimony.

Mr. Curley: It is only a matter of qualifying him as to his experience.

The Court: Objection sustained.

Mr. Curley (reading): ("Q. Are you acquainted with the plaintiff, Richard Bray, the gentleman who testified yesterday, and who sits here? * * *

A. With only what I was told by Doctor Root at the time of the examination.")

Mr. Elliott: Cross examination of Doctor Evans. (Reading): ("Q. At the time that the operation was performed and you were present, did you observe any scars on the scalp over the supposed injured area? * * *

A. Because I was under the sheet part of the time.")

Mr. Curley: Redirect examination. (Reading): ("Q. Did I understand you to say that you were under a sheet part of the time? * * *

A. Yes.")

Mr. Curley: Deposition of John J. Galligan. (Reading): ("Dr. John J. Galligan, being first duly sworn, testified as follows: * * *

A. He was Doctor Root's patient.")

Mr. Elliott: Cross examination. (Reading): ("Q. You have

stated, Doctor, that the examination was for the purpose of going in upon a tumor or abscess of the brain. * * *

A. I couldn't state definitely. Doctor Root made the diagnosis.")

The Court: Call you- next witness.

Mr. Kearney: If the Court please, at this time we will read to the jury the expectancy of the life of the plaintiff from the American Life Tables.

Mr. McFarland: If the Court please, it will be consented that the Court will charge the jury as to the expectancy of life of Mr. Bray.

The Court: The expectancy is 21.6, is it?

Mr. Kearney: —.6.

The Court: Very well.

Mr. Kearney: And at this time I reoffer the certificate of citizenship of the plaintiff.

Mr. McFarland: If the Court please, we have admitted that he is a citizen.

Mr. Kearney: And I ask that it be marked and filed in the case.

58 The Court: Objection sustained.

Mr. Kearney: Then I will ask to have it marked and filed.

The Court: It may be marked for identification.

Mr. Kearney: Let it be marked for identification as Plaintiff's Exhibit A.

The Court: Very well.

Mr. Kearney: I offer it in evidence on the part of the plaintiff as proof of his citizenship.

The Court: The objection to *it* admission is sustained, because the defendant does not deny that he is a citizen of the United States, but expressly admits it in its answer.

Mr. Kearney: There is one phase of the testimony it is intended to offset. I don't know whether the Court got it or not. Counsel for the defendant asked him where he was born. He says he was born in England, and the defendant corporation in this case is an alien. An alien cannot maintain a suit against an alien in the Federal Court.

The Court: I understand, but they admit in their pleadings that he is a citizen——

Mr. McFarland: Citizen of Arizona.

The Court: —of Arizona. They are bound by that. They cannot withdraw that without amending their answer.

Mr. Kearney: Out of an abundance of caution, I offer it.

The Court: It isn't necessary, and for that reason I sustain the objection.

MEADE CLYNE, M. D. called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination:

By Mr. Curley:

Q. You may state your name.
A. Meade Clyne.
Q. Where do you live, Doctor?
A. Tucson, Arizona.
Q. You may state your business or profession.
A. Physician and surgeon.

Mr. Curley: Do you now admit the qualifications of the Doctor to testify as an expert?
Mr. Elliott: Yes.
Mr. Curley: It is stipulated that the Doctor is qualified to testify.

Q. Do you know the plaintiff, Richard Bray, Doctor?
A. Yes, sir.
59 Q. Have you made any physical examination of Mr. Bray within the last week or such a matter?
A. Yes sir.
Q. State of what that examination consisted and what you found?

(Witness consults memoranda.)

A. The examination was made on the 22nd. The general condition was fairly good. His gait was rather unsteady.
Q. Speak loud enough so that the jury can hear you, Doctor.
A. His general condition was fairly good; his gait was unsteady. His heart and lungs were normal; blood pressure normal; reflexes slightly exaggerated. I found a depression which apparently was an opening in the skull, an inch and a half in diameter, about two inches behind the left ear and slightly above, slightly above the ear.
Q. Assuming, Doctor, that a man working in a tunnel, in a mine, is struck on the head by a falling stone with sufficient force, and of sufficient size to knock him down and stun him for some five, ten, or fifteen minutes, but from which he recovers and experiences no further inconvenience other than the natural soreness resulting from such a blow, for four or five days, or possibly a week, thereafter; and assuming that in about four or five days, or possibly a week thereafter he begins to experience dizziness when walking, and staggering unsteadily, which condition continues to grow gradually worse for approximately two weeks, when he is unable to longer continue work on account of such condition; and assuming that in about five or six weeks thereafter he is operated upon for an abscess of the brain, and the abscess located and opened within a short distance, say, three or four inches of the place of injury; that he had theretofore been in good health and had not within several years prior to such injury experienced any other injury or illness of any character, to his knowledge; what in your opinion would have been the cause of such abscess?

Mr. Elliott: I object to that question on the ground it assumes facts which are not exactly in evidence in this case. In the first place, it assumes the fact that Bray was stunned for five or six minutes. Bray's testimony in that respect is that he was knocked down and rendered unconscious. Now, there is a difference between unconsciousness and a stunned condition. And the second ground of the objection is that this question assumes that he had received no prior injury and had had no prior illness. Now Mr. Bray has testified here that he did have an injury—a rather serious one—at the time he was sixteen years of age, by falling down a ladder, and he also admitted on cross-examination that very likely he had received a number of injuries to his head and to his body while he was working as a miner during a period of thirty-eight years. Upon those grounds we object, because the question does not assume the facts that are in evidence here before the Court and the jury.

The Court: Well, as I remember the testimony, the witness state— I mean, as I remember the hypothetical question, it assumes that prior to that time he was in good health—good mental and physical condition.

Mr. Curley: Assuming that he had theretofore been in good health and had not within several years prior to such injury
60 experience- any other injury or illness.

The Court: The objection is overruled.

Mr. Elliott: Exception.

A. The cause would most probably have been the injury that he received.

Mr. Curley:

Q. If there had been no litigation pending Doctor, and you had been called upon to make an examination of Mr. Bray, and that state of facts had developed, would there have been any doubt in your mind as a physician as to the cause of the abscess?

Mr. Elliott: We object to that question.

The Court: I will sustain the objection.

Mr. Curley:

Q. You said, Doctor, that under that set of facts that it would be your opinion that the abscess would have been caused by the stroke on the head.

Mr. Elliott: I object to that question.

The Court: The Doctor has said that most probably it would have.

Mr. Curley:

Q. State whether or not, doctor, a stroke on the head would necessarily have to cause an abrasion on the scalp sufficiently to leave a permanent scar in order to produce an abscess of the brain.

Mr. Elliott: I object to that question, your Honor, unless for the purpose of this case counsel for the plaintiff incorporate in his question the character of the blow which is in evidence before the jury.

The Court: I think that objection is a good one.

Mr. Curley:

Q. There have been questions asked here as to whether or not there was a scar on Mr. Bray's scalp. Now I will ask you whether or not the blow would have to be of such a character as to leave a permanent scar in order to produce an abscess of the brain.

Mr. Elliott: Suppose it was a pillow or a sand-bag or an ax that had hit him. I can't see how he can answer that.

(Question read.)

The Court: I sustain the objection to that question as put to the witness.

Mr. Curley:

Q. State whether or not, Doctor, a stroke on the head, or a lick on the head by a falling stone would necessarily have to cause or leave an abrasion of the scalp——

Mr. Elliott: We make the same objection.

61 Mr. Curley: —or produce a permanent scar in order for the stroke or the lick upon the head to have caused or resulted in an abscess of the brain?

Mr. Elliott: The same objection, your Honor. The weight of the rock is not specified and the direction of the blow, or the distance through which that rock fell, showing the force and the momentum it might have got at the time it hit him.

Mr. Curley: It is a question of whether or not it hit him with sufficient force. Mr. Bray does not know the weight of the rock. He doesn't know the size of the rock. He doesn't know probably within a foot of where it fell. The question is whether a lick of that character could have resulted without leaving a permanent scar on his scalp.

The Court: You mean to ask the witness, I presume, whether or not an abscess of the brain could have been caused by a blow made by a falling rock striking the side of the head, without such a blow leaving a scar on the side of the head.

Mr. Curley: And it would be a blow of such a character as would produce an abscess of the brain. Of course, you might have a little blow on the head that would not result in anything.

The Court: Well, I will permit you to ask a question based upon the testimony in this case—a hypothetical question based upon the testimony in this case. I think you can frame such a question,——

Mr. Curley: Well, I was trying to keep within that rule.

The Court: —and at the same time keep within the record. I do not hold that the testimony which you call for may not be admitted, but I sustain the objection because your hypothetical question is not based upon the testimony in the cause.

Mr. Curley:

Q. Assuming, Doctor, that a man working in a tunnel in a mine is struck on the head by a falling stone with sufficient force to knock

him down and stun him for some five, ten, or fifteen minutes, but from which he recoveres and experiences no further inconvenience other than the natural soreness resulting from such a blow, for four or five days, or probably a week; and assuming that in about four or five days, or probably a week thereafter he begins to experience dizziness when walking, and staggering unsteadily, which condition continues to grow gradually worse for approximately two weeks, when he is unable to longer continue work on account of such condition; and assuming that in about five or six weeks thereafter he is operated upon for an abscess of the brain and an abscess is located and opened within a short distance, say, three or four inches of the place of injury; in your opinion would it have been necessary that the stroke upon the head that I have just mentioned should have left a permanent scar upon the scalp in order to have been of such character or such force as to have resulted in or produced the abscess that I have just mentioned?

62 Mr. Elliott: Is that all of the question?

Mr. Curley: That is all of the question.

Mr. Elliott: We object on the same ground, your Honor. It is still too general. We have a question setting forth the falling of a rock and striking the man and stunning him. Now we haven't been told the weight of the rock. Stunning of a man is a very relative term, and we ought to have the weight of the rock or the distance it fell, or when it struck him. We have rather positive evidence here as to what Mr. Bray thought that rock weighed, and we have absolute evidence of how far it fell, and we have positive evidence of the date that rock hit him. And the evidence is not that Bray was stunned but that he was knocked down and rendered unconscious, and the use of the word "stunned" I think is using a word that is not in evidence, because there is a vast difference between being stunned and rendered unconscious. I might be stunned and walk around, dazed, not see and hear distinctly, but if I am rendered unconscious, I am knocked down and knocked out.

The Court: Do you care to amend your question?

Mr. Curley: Well, if that is the objection, I will amend it by striking out the word "Stunned," and was rendered unconscious for five, ten or fifteen minutes.

Mr. Elliott: Will the Reporter please note an exception.

(Question read as amended.)

A. I think that could happen without necessarily leaving a scar.

Mr. Curley:

Q. State, Doctor, in what manner a lick on the head, such as I have just described to you, does cause or may cause an abscess of the brain.

A. The sudden jarring might, probably would break a small vein, a very small vein or blood vessel, and a clot would be formed, and around this clot the germs, or in this clot the germs might form or center, and an abscess be started.

Q. That is the manner in which they are formed?

A. Ordinarily formed.

Q. Comparatively what per cent of brain abscesses are the result of strokes on the head?

A. Almost one-half of brain abscesses give a history of having been an injury.

Q. Of an injury?

A. Yes sir; of an injury.

Q. Approximately what per cent. Doctor, of brain abscesses result from inner ear diseases?

A. Approximately two-fifths.

The Court: Of what?

Mr. Curley: From inner ear diseases.

Q. Approximately two-fifths?

A. It is very nearly two-fifths.

Q. Then in your opinion the remaining causes or one-fifth of the abscesses of the brain are caused from what other conditions?

63 A. Are caused from general septic conditions, which percentage would necessarily include then brain tumors and abscesses on all old parts, that is, old clots that had been caused by hemorrhages previously.

Q. Then one-fifth of the brain abscesses are distributed among these other various causes?

A. Yes sir.

Q. Would it be possible, Doctor, for a man to have an inner ear disease of such character as would produce an abscess of the brain, without leaving some marks upon his ear as a result of the disease?

A. I don't think so.

Q. You don't think it would be possible?

A. I think there might be some scars.

Q. You don't think it would be possible for him to have such a disease without leaving a scar upon his ear?

A. No sir.

Q. Have you made any examination of Mr. Bray's ears within the last few days to ascertain whether or not he is carrying such a scar?

A. Yes sir.

Q. In what condition did you find his ears?

A. They were—I did not discover any evidence of any old troubles.

Q. Does the point of injury, Doctor; that is, the point of the blow upon the head necessarily control in ascertaining the location of an abscess? In other words, Doctor, is there any necessary connection between the location of the abscess and the point of injury, or the point that he receives the blow?

A. No, there is not.

Q. There is not?

A. There is not.

Q. A man might receive a blow on the left side of his head and result in an abscess on the other side; is that true?

A. Yes sir.

Q. What, in your opinion, Doctor, is the effect upon the brain of an abscess on the brain which has been opened and drained?

Mr. Elliott: I think I will object to that question, your Honor, unless the region of the brain is specified.

Mr. Curley: I am asking him the effect on the brain as a whole.

Mr. Elliott: I think the region of the brain in which the abscess is located should be specified.

The Court: Objection overruled.

Mr. Elliott: Exception.

The Witness: Now, the question was——

(Question read.)

A. The effect would be a destruction of some of the nerve cells and the adhesions that would result in the drainage of such an abscess—adhesions between the dura.

Mr. Curley: Would there be any probable future to such a condition?

64 A. The probable future of a loss of nerve cells and adhesions would result in the possibility of the patient having epileptic fits and some sort of mania, organic mania. And there may result also a re-formation of the abscess.

Q. Is that to be anticipated after a person has had one abscess?

A. That may be expected.

Q. In what condition does the removal of the skull or the bone in the performance of an operation to remove the abscess leave his brain as to being susceptible to injury from the outside?

Mr. Elliott: I object to that question, your Honor. The result anticipated here is too remote from the injury claimed to be of any value here—to be considered by the jury, because it is a vague possibility.

The Court: Read the question.

(Question read.)

The Court: I think that question is involved, and I sustain the objection to it.

Mr. Curley:

Q. Do the conditions you have just described, Doctor, with reference to the effect of the abscess upon the brain matter and nerve matter of the brain result in permanent impairment of the brain?

A. Yes sir.

Q. In what way?

A. The nerve cells that have been destroyed have a function, and they will not be replaced. Also the scar tissue that results is permanent.

Q. Would that have any effect upon his ability to perform heavy manual labor?

A. I think so.

Q. State whether or not in your opinion it would be possible for a man upon whom an operation has been performed—to relieve him from the effect of an abscess of the brain and from whose head a circular portion of the cranium about an inch and a quarter or an

inch and a half in diameter has been removed, and an abscess opened and drained, to ever attain a condition sufficiently normal physically to enable him to perform heavy manual labor?

A. No sir.

Mr. Elliott: I object to that question. I think it is a repetition. He asked him the same proposition in a much shorter question.

The Court: Objection overruled.

A. No sir.

Mr. Curley: Would a newly formed abscess probably contain a thin fluid, Doctor?

A. Yes sir.

Q. Would an abscess that had lain dormant in the brain for many months or a year, or years, when opened probably contain thin fluid?

65 A. It would probably contain thick pus.

Q. Probably contain thick pus. Describe to the jury the reason for it. Describe to the jury the difference between a newly formed abscess and an old abscess in reference to the character of pus you would expect to find on opening it.

A. You would expect to find in a newly formed abscess rather a thin fluid and in an older one, in an old abscess thick fluid.

Mr. Curley: You may cross examine.

Cross-examination.

By Mr. Elliott:

Q. Doctor Clyne, haven't you got that turned around; that is, that in a newly formed abscess you would expect to find the thicker fluid, and as the abscess went on and became older you would find the thinner fluid?

A. No, sir.

Q. You stay with that?

A. I stay with it.

Q. All right. Now, if this person, the plaintiff, had been working in a tunnel and a rock had fallen on him, described to you by Mr. Curley here, and that rock cut his scalp in two places, as he testifies, so that blood ran from it in such quantity that it was observed and remarked by a third person working with him would you or would you not consider that there would be some evidence of that cut on the scalp within two months and twenty-two days from the date of that injury?

A. There might be some evidence of it.

Q. Would there not almost certainly be some evidence of it, especially to the eye observing the scalp after the hair had been removed, had been shaven for an operation?

Mr. Curley: I will object to that. There is no evidence that the hair was shaven over that portion of the scalp that was injured.

The Court: Objection sustained.

Mr. Elliott:

Q. Do you not think, Doctor, that there almost surely would be within that time some evidence of that cut?

A. I think there might possibly be some evidence of it. Of course, that would depend upon whether it was just simply a scratch or how deep it was cut.

Q. But if the man had such a cut on his head that the blood was flowing from it, and you could readily observe it, would you consider that he would have evidence of such a scar?

A. Why, no, I don't think so.

Q. If upon careful examination within that time after the injuries I have stated to you no evidence was found of any such scar, wouldn't that create in your mind a doubt as to whether the cuts on the head had been received?

Mr. Curley: I object to that, if your Honor please. There is no evidence here that there was any careful examination at the time.

The Court: Objection overruled.

66 A. Yes sir.

Mr. Elliott:

Q. That would create some doubt then in your mind. You have stated, Doctor, that fully fifty percent of the recorded cases of brain abscess are of traumatic origin, or due to blows received on the head. Now, would the fact that Church & Peterson say that twenty-five percent instead of fifty is the recorded percentage change your opinion on that?

A. I appreciate that they will differ on some things. That certainly would have some influence.

Q. Church & Peterson is a standard work?

A. Yes sir.

Q. How many cases of abscess of the brain have you diagnosed in your career as a practitioner?

A. I think I have seen one case of brain abscess diagnosed.

Q. You diagnosed it?

A. No, I assisted in the diagnosis.

Q. Is that Mr. Gray's case, or not?

A. Another one.

Q. Now, you have stated that from your examination of Bray's head and from what he told you, that you thought that the abscess or the condition which was uncovered by the operation must probably have been due to the injury—that was your statement—that he detailed. Now, if he had detailed to you—had told you of having received no injury, would you nevertheless have concluded from your examination positively that the condition that was uncovered in Mr. Bray was due to an injury that had been received on his head?

A. No, sir.

Q. You pin your faith in your diagnosis or rather, you pin your faith in your opinion that that condition that was uncovered

in Bray's head was due to an injury that he received to his head, upon Bray's statement to you with relation to an injury on his head.

Mr. Curley: I object to the question. There is no statement of that kind in the record. I submit.

The Court: Objection overruled.

A. Yes, sir.

Mr. Elliott:

Q. Then if the history is no good, the judgment is no good, and that is no, fault of yours.

Mr. Curley: I object to the question as not proper.

The Court: Objection overruled.

A. Yes sir.

Mr. Elliott:

Q. Doctor Root has testified in this case that the fluid from Bray's head was removed from the left lateral ventricle of the brain. What is the ventricle of the brain?

A. It is a cavity in the brain.

Q. Inside of the brain?

A. Yes, inside of the brain.

Q. How many of them are there?

A. There are four.

Q. Could you describe them just briefly, Doctor, to the jury? I am not asking you to try to get a qualification on you, but just so they will understand you.

A. There are two cavities in the cerebrum which are called the first and second. The third is between that and the medulla and the fourth is lower down. It is near the spinal cord.

67 Q. Now, is there any disease of the brain in which you have fluid or pus in these cavities of the brain?

A. Yes sir.

Q. That you might have it in the left lateral ventricle?

A. Yes, sir.

Q. From which Doctor Root testifies that he removed fluid?

A. Yes sir.

Q. What is the name of that disease?

A. He could have a brain abscess.

Q. Is there any other condition that would produce it?

A. He might have had some meningeal trouble possibly.

Q. What is hydrocephalis?

A. Is the abnormal amount of fluid in the ventricles.

Q. Is that a common condition or disease arising in the brain?

A. Well, I don't think it is very common.

Q. It does occur?

A. It does occur; yes.

Q. Does it not deposit its deposit of fluid or pus within the ventricles or cavities where it is an internal hydrocephalis?

A. It deposits fluid.

Q. Now, when you learned, Doctor Clyne, that this fluid was removed from the left lateral ventricle of Bray's head, did that not create a little wonderment or doubt in your mind as to whether that was an abscess or not?

A. I think that possibly would create more wonderment and doubt than if it were—that is, if it were not removed.

Q. That is exactly where you would expect to find an abscess due to a blow on the head—where would you expect to find it, on the inside or the outside, on the cortex or within?

A. On the cortex is the most common site.

Q. What is the cortex? What do you mean by that?

A. That is the outside of the brain.

Q. Immediately within the skull?

A. Yes, in the area of the brain immediately in the skull.

Q. Do you know the causes for hydrocephalis?

A. I don't know. I don't think I do know any definite causes for it.

Q. Do you understand, or have you ever seen given an injury—an injury as the cause for hydrocephalis, an injury to the head?

A. No sir; I never have understood that.

Q. Isn't it a fact that injury is not given as a cause for hydrocephalis?

A. I don't know, and so I don't remember whether it has anything to do with it.

Q. This hydrocephalis, internal hydrocephalis, as it occurs in the brain is a disease of these cavities?

A. Yes sir.

Q. Now, in your opinion, Doctor, as a physician and surgeon, in order for a blow to produce an abscess in one of these ventricles away in deep in the brain, would it not be almost necessary that that blow which caused it would have been of a most shattering character; that it would have torn things up and would have laid the victim up in bed when he received it

A. Not necessarily.

Q. You have spoken, Doctor Clyne, of a possibility of a recurrence of an abscess where one has once been formed and has been operated upon. Now as time goes on and there is no recurrence, the likelihood of the recurrence becomes less and less, does it not?

68 Q. And where a man is showing a steady improvement considerably over a year after the operation, why, he can begin to get away from the likelihood of a recurrence of the abscess.

A. Yes sir.

Q. Have you seen any evidence of any epilepsy in Mr. Bray?

A. No sir.

Q. Did he tell you that he had had any epileptic fits?

A. No sir.

Q. From your examination of Mr. Bray would you consider that the motor areas of his head have been injured by that abscess?

A. No sir.

Q. The abscess wasn't where the motor areas would be injured?
A. No sir.
Q. Then is it not true, Doctor, that the following of epilepsy in this case is not so likely inasmuch as there has been no injury to the motor areas?
A. Yes sir.
Q. That is true?
A. Yes sir.

Mr. Wlliott: I think that is all.

Redirect examination.

By Mr. Curley:

Q. What portion of the brain, Doctor, do you refer to in speaking of the motor areas?
A. That would be in the cortex.
Q. In the cortex?
A. Yes sir.
Q. That is what they call the outside of the inside?
A. Yes, outside.

Mr. Curley: That is all, Doctor.

I. E. HUFFMAN, M. D., called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Curley:

Q. What is your business, Doctor?
A. Physician and surgeon.
Q. In Tucson?
A. Yes sir.

Mr. Curley: You will concede the Doctor is qualified?
Mr. Elliott: Yes, except I would like to know what particular branch of surgery and medicine he follows:
The Witness: General practice.

Mr. Curley:

Q. General practice?
A. Yes sir.

Mr. Elliott: Well, that will allow me to ask a question. Otherwise, we admit the Doctor is qualified in the case.

Mr. Curley:

Q. Doctor, do you know Mr. Bray?
A. Yes sir.
Q. Have you made any physical examination of Mr. Bray within the last week or such a matter?
A. I have.

Q. What did you find his condition to be, in what condition did you find him?

69 A. Well, I found his general condition fair.

Q. Did you examine his lungs?

A. Yes sir.

Q. In what condition were they?

A. His lungs were in good condition.

Q. How was his hear- action?

A. The heart action good.

Q. Blood pressure?

A. Blod pressure was normal and a depression of the skull back of the ear, probably two and one-half or three inches, where apparently a portion of the skull had been removed; temperature normal.

Q. In an operation for an abscess of the brain, Doctor, in which a portion of the skull is removed, state to the jury how an operation of that kind is performed? What do they do? How is a man prepared for such an operation?

Mr. Elliott: If your Honor please, I object to that question. I think it is irrelevant and immaterial how a man is prepared for the operation. It has no bearing on any of the issues in this case, proving or disproving any contention.

The Court: I sustain the objection.

Mr. Curley:

Q. I will ask you, Doctor, if preparatory to an operation of that kind, if the skin covering the skull is cut and laid back prior to removing the bone from the skull?

A. Why, it is usually a semi-circular incision, and it is laid back, the flap is laid back, and leaving an attachment to the skull.

Q. Assuming, Doctor, that a man working in a tunnel, in a mine, is struck on the head by a falling stone with sufficient force to knock him down and render him unconscious for say five, ten of fifteen minutes, but from which he recovers and experiences no further inconvenience other than the natural soreness resulting from such a blow for four or five days, or probably a week; and assuming that in about four or five days, or probably a week thereafter he begins to experience dizziness when walking, and staggering unsteadily, which condition continues to grow gradually worse for approximately two weeks, when he is unable longer to continue work on account of such condition; and assuming that in about five or six weeks thereafter he is operated upon for an abscess of the brain, and an abscess is located, opened within a short distance, say, three or four inches of the place of injury; and assuming that he had theretofore been in good health and not within several years prior to such injury—having experienced any other injury or illness of any character; what *is* your opinion would have been the cause of such abscess?

A. I think the blow would have been the cause.

Q. Now, state to the jury why you think the blow would have been the cause? How would you arrive at that diagnosis?

A. Well, by the exclusion of other causes upon examining the patient and taking his statement and finding that there was no other cause for the injury, for the abscess, and that together with the fact that there was an injury would indicate that the abscess was caused by the injury.

Q. Approximately what proportion of abscesses of the brain are due to external injuries on the head?

A. Well, nearly one-half.

Q. Nearly one-half. Within what radius, Doctor? Do the authorities agree upon the number of abscesses due to external injuries of that character?

70 A. From one-fourth to one-half.

Q. In your opinion nearly one-half are due to that cause?

A. Yes sir.

Q. To what cause is the remaining—what causes are the remaining abscesses of the brain usually traceable?

A. To septic conditions, middle ear disease, and other septic conditions.

Q. Approximately what proportion of abscesses of the brain are due to inner ear diseases?

A. Probably about two-fifths.

Q. Then in your judgment about two-fifths of all abscesses of the brain are due to inner ear diseases?

A. About two-fifths.

Q. And nearly one-half are due to external injuries?

A. Yes sir.

Q. In what manner, Doctor, is an abscess of the brain caused—by a stroke on the head, a lick on the head?

A. Well, that would be caused by the injury to the—by the jar causing an injury to the brain, probably a breaking of a vessel, or lowering the vitality of the brain tissue until the germs would find lodgment there and start an abscess, formation of an abscess.

Q. Then any stroke on the head sufficiently hard to rupture any of the small blood vessels of the head would be liable to produce an abscess?

A. It might; yes sir.

Q. Would it be necessary to fracture the skull in order to produce an abscess?

A. No, I don't think it would.

Q. Does the point of injury, Doctor, necessarily, control the location of the abscess?

A. It does not.

Q. What in your opinion is the effect on the brain of an abscess of the brain which has been opened and drained?

A. It necessarily leaves impairment of the brain tissue which will not be re-formed.

Q. Do you regard such a condition as a permanent injury?

A. I do.

Q. State to the jury why, Doctor.

A. Because the brain tissue that has been injured is not regenerated—rebuilt and the repair is accomplished through the formation

of scar tissue, which, of course, has no—hasn't the same function that the brain has, the brain cells.

Q. What is the probable outcome of a condition of that kind, Doctor, upon the future condition of the patient?

A. You mean what might result from it?

Q. Yes.

A. Epilepsy or traumatic dementia might result.

Q. What would you say as to the probability of a person who has been operated upon for a brain abscess and an abscess discovered and opened and drained ever again reaching such a normal condition as to permit him to do heavy manual labor?

A. I don't believe that he ever will.

Q. Why?

A. Because of the necessary destruction of brain tissue?

Q. Would the heavy manual labor have some effect upon the brain as it remains after the operation?

A. It would probably increase the chances of those things following that have been mentioned.

Q. That you have mentioned?

A. Yes.

Mr. Curley: You may cross examine.

71 Mr. Elliott: If your Honor please, it is very close to twelve o'clock, and my cross examination will surely run over this space of tiem.

The Court: The jury will report at 1:30.

FRIDAY, Dec. 3rd, 1915—1:30 p. m.

The Court: Proceed.

Cross-examination.

By Mr. Elliott:

Q. Now, Doctor Huffman, if Mr. Bray, the plaintiff here in this case, never did receive any injury to his head, then this condition you have described in his head would be due to some other cause, would it?

A. Yes sir.

Mr. Elliott: That is all.

MRS. MABLE BRAY, called as a witness on behalf of the plaintiff herein, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Kearney:

Q. State your name, please.

A. Mrs. Mabel Bray.

Q. Mrs. Bray, what relation, if any, are you to Mr. Bray, the plaintiff in this case?

A. His wife.

Q. In August, 1914, where were you living?
A. In Morenci, Arizona.
Q. Where was Mr. Bray working at that time?
A. For the Morenci-Arizona Copper Company, Morenci.
Q. Do you remember the time that Mr. Bray was injured?
A. Yes sir.
Q. While he was working for the Arizona Copper Company?
A. Yes sir.
Q. About August the 4th, 1914?
A. Yes sir.
Q. That was at Morenci, that he was injured?
A. Yes sir; at Morenci.
Q. Do you remember Mr. Bray's coming home one evening after work?
A. Yes sir.
Q. And do you remember of his complaining of some injuries?
A. Yes sir.
Q. Do you know what they were?
A. Yes sir; he came home looking quite pale.

Mr. Elliott: I object to the question, your Honor, on the ground that the complaint does not make Mrs. Bray competent or relevant.
The Court: Objection sustained.

Mr. Kearney:

Q. What injuries, if any, did Mr. Bray have?
72 A. Hit on the head with a rock.

Mr. McFarland: If the Court please, if the witness knows of her own personal knowledge; not what he said.

The Court: Anything that Mr. Bray told you would not be competent evidence. Just state what his condition was, if you know. State what you know of your own personal knowledge; not anything that he told you.

Mr. Kearney:

Q. That is, what you saw and observed. Now did you examine him that evening?
A. Yes sir, I examined him and there was blood on his hair. His hair was quite long, and there was blood on his hair, and I bathed the wounds, two cuts, and he went to bed.
Q. I didn't understand you, Mrs. Bray?
A. I bathed the wounds. There were two cuts and I bathed them, and he went to bed.
Q. And on what part of his head were those wounds?
A. On the left side.

Mr. Kearney: That is all.
The Court: Any cross examination?
Mr. Elliott: No questions, your Honor.
The Court: That is all, Mrs. Bray. You may be excused.
Mr. Kearney: We rest.
Mr. Curley: The plaintiff rests.

The Court: Call the first witness for the defendant.

Mr. Elliott: If your Honor please, I would like to call the plaintiff, Richard Bray, under the statute for the purpose of cross examination, as a party.

The Court: Come around, Mr. Bray.

RICHARD BRAY, called as a witness for the defendant under the statute, having been previously sworn, was examined and testified as follows:

Cross-examination (under the statute).

By Mr. Elliott:

Q. How long did you work for the Arizona Copper Company at Morenci?

A. I was in the second month.

Q. How long altogether did you work for the Arizona Copper Company while you were in Morenci?

Mr. Kearney: I object to that as immaterial and irrelevant.

The Court: What is the purpose of the question?

73 Mr. Elliott: I wish to show the period which he was employed by the defendant at Morenci. He has testified that he was in the employ of the defendant. Now I wish to know the period.

The Court: That is admitted to your answer.

Mr. Kearney: That he was employed by the defendant, yes.

The Court: Objection sustained. I will change my ruling on that. I will overrule the objection because—go ahead.

(Question read.)

The Court: Answer it.

A. Why, I was in my second month when I got hurt—when I laid off.

Mr. Elliott: On or about what date did you go to work for the company?

A. The 15th of July, as near as I can tell.

Q. 1914?

A. Yes sir, night shift.

Q. Did you have any physical examination at the time you went to work?

A. Yes sir.

Q. What was the nature of that examination?

A. Well, I went to the office with—when I got hired I got a card from the foreman to take to the doctor, and I went in there and the doctor said, "you are o. k.——"

Mr. Curley: Never mind. Did you have any physical examination; that is the question.

A. No, I never had any. He marked me card o. k., and give me the card back.

Mr. Elliott:

Q. What doctor examined you?

A. Doctor Goodrich. I had to have that card before I could go to work.

The Court: You had better just answer the question.

Mr. Curley: Just answer the question, Mr. Bray, and stop.

The Witness: All right.

Mr. Elliott:

Q. Mr. Bray, after going off shift on the day on which you claim you received your injury, did you not have a conversation with a man by the name of William Jane outside of the tunnel in which you were working?

Mr. Kearney: I object to that as immaterial and irrelevant.

The Court: Objection overruled.

A. Yes.

Mr. Elliott:

Q. Who was present at that conversation?

A. Why, Noah Green.

Q. That was your partner?

A. That is my partner.

Q. How much of the time that you were working for the company, did Noah Green work with you?

74 A. Well, all the time as far as I know.

Q. He was working with you all the time?

A. Yes, as near as I can tell. Probably there might be a shift that he didn't; I don't know.

Q. What, if anything, took place at this meeting or conversation among you three, yourself, William Jane, and Noah Green?

Mr. Kearney: I object to that as immaterial and irrelevant.

The Court: Unless it has some bearing on this case. I cannot tel-.

Mr. Elliott:

Q. I will ask you, Mr. Bray, if in your deposition in Salt Lake City, you did not state that you and Noah Green walked outside of the tunnel after quitting on the day on which you *cal*im you got your injury, and on the outside met William Jane and stopped there waiting for the whistle to blow, and while there you stated—Noah Green told William Jane about your having been hit on the head with a rock and knocked unconscious?

A. Yes sir.

Q. That conversation took place, did it?

A. Noah Green told William Jane, yes.

Q. I will ask you, Mr. Bray, if it is not a fact that when you went to the hospital after this injury which you claim, upon repeated questionings as to whether you received an injury or not, that you denied having received that injury?

Mr. Kearney: I object to that, if your Honor please. The purpose there is to get in a conversation that took place there between this witness and the Doctor. It is a privileged communication.

The Court: The objection is sustained unless you ask him another question, with whom the conversation took place.

Mr. McFarland: There is nothing in that question that involves any confidential communication between Mr. Bray and the Doctor. It may have possibly been between some other people.

The Court: I don't know whether it was a doctor or not.

Mr. McFarland: It would only be incompetent provided it was said to the doctor. It might have been said to someone else not connected with the hospital, and no physician connected with the hospital.

The Court: Well, you gentlemen know whether it was in response to some question propounded by the physician. I think you should disclose it, and if there is an objection to it, the court will rule on it.

Mr. Elliott: I will ask him one or two pre-minimary questions.

The Court: All right.

Mr. Elliott:

Q. You consulted doctors, did you, after you claimed this
75 trouble came upon you at Morenci?

A. Consulted doctors?

Q. Yes, did you go to any doctors?

A. After I was hurt?

Q. After you say you were hurt, yes.

A. No, not until—I worked up until the 18th. I never snitched.

Q. After the 18th did you go to see any doctors?

A. What?

Q. Did you go to see any doctors after the 18th?

A. I went to the hospital.

Q. Did you go and see any doctors?

A. I saw the doctor.

Q. What doctor did you see?

A. Doctor Goodrich.

Q. Any others?

A. Doctor Stanton.

Q. Whose doctors did you consider Doctors Goodrich and Stanton were when you consulted them?

Mr. Curley: I object to that as immaterial.

Mr. Kearney: They attended him. It doesn't make any difference.

Mr. Curley: He went to consult them.

Mr. Elliott: If your Honor please, I believe not. If a person goes to a doctor, knowing that there are other doctors, and if he goes there for the purpose of allowing an examination for another person, he would not create a privilege then. It would be entirely a question as to how the prospective patient looked at the thing himself.

The Court: I think that very question was decided in the Clerke case adversely to your contention. I will sustain the objection on the ground that it is objected to by counsel for the plaintiff because it appears that if such a statement was made it was a confidential communication between this witness and the physician.

Mr. Curley: Yes, that is the ground of our objection.

Mr. McFarland: May we have an exception noted?
The Court: Yes.

Mr. Elliott:

Q. Now, Mr. Bray, I will ask you this question: when you first went to see Doctor Goodrich, is it not a fact that upon repeated questionings by him as to whether you had received a head injury you did not deny receiving those injuries?

Mr. Curley: I object to it, if your Honor please, as a privileged communication.
The Court: Objection sustained. Now do you admit that at that time this physician, or these physicians were at the hospital and in the employ of the hospital for the purpose of attending the employees of the company? If not, why, I think the record had better show that on examination; I think this witness better be ex-
76 amined with reference to that matter before I rule on the question, if there is any question about it.
Mr. Curley: The witness has stated that he went to the hospital.
The Court: And as to whether or not the conversation took place there. In other words, show the relation of physician and patient.
Mr. Curley: I understand.
The Court: If there is any question about it.
Mr. Kearney: They will not deny that.
The Court: I do not know what they will deny.
Mr. Kearney: We will ask the witness a question for the purpose of laying the foundation.

Q. Mr. Bray, were this the company hospital, A. C. Company hospital you went to?
A. Yes sir.
Q. And were these physicians there at that hospital for the purpose of treating employees who became injured?
A. Yes sir; each man pays $1.80 or $1.85 a month for that service.
Q. And in that way those physicians are employed by the employees?
A. Yes sir.
Q. And you went there for the purpose of consulting them?
A. Being treated.
Q. About your injuries for your benefit?
A. Yes.
Q. And you consulted those physicians for the purpose of receiving medical treatment from them?
A. Yes sir.

Mr. Kearney: That is all.
The Court: Now, then, you object to the introduction of any testimony, or any conversation between either one of those physicians and this witness?
Mr. Curley: Any conversation or the result of any examination.
The Court: On the ground——
Mr. Curley: —that it is a privileged communication.

The Court: —that it is a privileged communication; and I will sustain the objection.

Mr. McFarland: Now, if the Court please, I understand that these physicians were employed by the employees of the Arizona Copper Company, as stated by Mr. Bray.

The Court: Well, go ahead.

Mr. McFarland: If that be true, the action of those physicians would not be binding upon the defendant; because they might be employed by this hospital, by the employees, and in consideration of a certain monthly payment, it wouldn't necessarily follow
77 that they were physicians for the defendant.

The Court: It seems to me it doesn't make any difference whether they were physicians employed by Mr. Bray or whether they were employed by the company. If he had consulted them in their professional capacity, then I think all communications which passed between him and such physician or physicians were confidential, and on his objection cannot be repeated here at this trial.

Mr. McFarland: We except.

Mr. Elliott: I should like to ask one more question.

The Court: You may for the purpose of the record, if you desire.

Mr. Elliott: If I am going too far after the Court's ruling;—I don't intend to press it intentionally.

The Court: I understand. If you want to preserve the record and the exception, I will permit you to ask another question along that line.

Mr. Elliott:

Q. I will ask you, Mr. Bray, if on the taking of your deposition in Salt Lake City in October of this year you weren't asked if, when you went to see the doctors in Morenci, upon repeated questioning, if you had received such an injury, you didn't deny having received that injury; and did not reply that you might or might not?

Mr. Curley: I object to that, if your Honor please. The objection was made at the time in Salt Lake City when that question was asked that it was calling for—it was a confidential communication.

The Court: Objection sustained.

Mr. McFarland: We except to that.

The Court: I also sustain the objection to the questions that were asked this morning, and which I took under advisement. They were not read and need not be read. I will give you the benefit of an exception now, if you desire it.

Mr. McFarland: No sir; not on the ruling this morning.

Mr. Elliott:

Q. Mr. Bray, did you or did you not, report the fact of this injury which you have detailed to this jury, to any agent, officer connected with the Arizona Copper Company, Limited?

Mr. Curley: I object to that as too indefinite.

The Court: Objection overruled.

The Witness: What was the question?
(Question read.)

A. Not to my knowledge.

78 Mr. Elliott:

Q. Did you not know that it was your duty as an employee there to report any injury which you received in the employ of the company?

Mr. Curley: Objected to as argumentative, and not proper cross-examination.

The Court: This witness is called under the statute.

Mr. Curley: Yes, I object to it. It isn't proper cross-examination; that it is argumentative, immaterial and irrelevant—it is not shown that such a rule ever existed.

Mr. McFarland: If the Court please, just on that one question; I think it would tend to show his delay or not reporting it at all. The jury might consider that with reference to what it is worth as to whether or not there was any injury at all.

The Court: As to whether or not he did not know whether it was his duty to report it, is the question.

Mr. McFarland: He can answer that "yes" or "no."

The Court: Well, in the absence of any rules, and in the absence of any showing that he was familiar with those rules, I will sustain the objection.

Mr. Elliott:

Q. Did you know of any rule or requirement of the Arizona Copper Company that an injured employee should report his injury?

A. I never saw any.

Q. Did you know of such a rule?

A. No, I did not know it.

Q. Don't you know that is the custom all over the mining districts of the West?

Mr. Curley: Objected to as immaterial.

The Court: Objection overruled.

Mr. Elliott:

Q. Don't you know that?

A. I don't know as it is in every camp. I know it is in some.

Q. You have stated that your expenses from Morenci, Arizona, to Salt Lake, Utah, were $150; that part of that was for taking care of your wife, taking her from Morenci, to Salt Lake.

The Court: There has been no showing made as to how much he paid out, and in the absence of that I charge the jury that he could not recover anything for that. There is no use of cross examining on that point, because they haven't made a sufficient showing to entitle them to recover any part of it.

Mr. Elliott:

Q. You testified, Mr. Bray, that a rock fell from the side of the

tunnel in which you were working, a distance of four or five feet, striking you upon the head. Now what was the size of that rock?

A. I couldn't tell you. I have told you that a thousand times, about the size of the rock, and every other thing about it. I couldn't say, or about the height either.

79 Q. I asked you yesterday if you did not state in the taking of your deposition in Salt Lake, that that rock weighed forty-five or fifty pounds.

A. Well, I——

Q. Just a moment. Wait until I get through with my question. And you answered me by saying that it was my talking that made you say that it was forty-five or fifty pounds. Now I ask you this: didn't these questions and answers take place in the taking of this deposition in Salt Lake between yourself and your own attorney, Mr. Sullivan, upon your direct examination. "Could you tell us about the size of the stone that fell—give us any idea? If so, do so." You answered, "It was something as near as I can tell, pretty near as big as that tab there (indicating) that folder, whatever you call it. It was quite a rock. The ground, you know there, is kind of soapy, and it breaks easy." By the "tab," you referred to a tablet on the table which was apparently thirteen or fourteen inches wide by twenty-two or twenty-four inches long. Your attorney asked you, "I will ask another question, "About what was the dimensions, as near as you can tell, of that stone; how many inches." Answer. "I couldn't tell." "About what would be its weight?" "I couldn't tell exactly. It was quite a rock." "Was it as large as your head?" "It seemed to be longer than it was in depth, in thickness, about like that (indicating), as near as I can tell." Then your attorney said, "That does not appear in the record. The jury could not tell from that. About how many inches would you say it was each way?" And your answer, "Well, it was probably eighteen inches long, as near as I can tell. I couldn't tell within an inch or two."

A. I say that now; that I couldn't tell, nor I can't.

Mr. Elliott: That is all.

Mr. Kearney:

Q. Was this rock that fell on you a hard rock like granite or was it a soft rock?

A. It was soft. It wasn't a country rock at all. It was ore. It was copper ore, soft nature.

Q. Soft nature?

A. Yes.

Q. When it fell, did it break to pieces?

A. When it struck me it busted and fell all over the place. It wasn't a big——

Mr. Kearney: That is all.

Mr. Elliott: That is all, Mr. Bray.

RICHARD WILLIAMS, called as a witness on behalf of the defendant herein, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Elliott:

Q. State your name to the Reporter and the jury, please.
A. Richard Williams is my name.
Q. Where do you reside?
A. Morenci.
Q. Do you know Richard Bray, here, the plaintiff in this case?
A. Yes sir. I knew him while he was in Morenci.

80 The Court: Mr. Williams, you look like a healthy, stout man. The farthest man on that jury there has to hear every word you say. Now, just speak as if you were talking to him, and ignore the balance of us.

Mr. Elliott:

Q. Do you know the Arizona Copper Company, Limited?
A. Yes sir.
Q. The defendant in this case?
A. Yes sir.
Q. What, if any, position with the Arizona Copper Company——
A. Shift boss.
Q. —have you occupied?
A. Shift boss.
Q. Where?
A. In Morenci, A. C. Mine in Morenci.
Q. At Morenci?
A. Yes sir.
Q. Were you acting in the capacity of such shift boss in the months of July——
A. Yes sir.
Q. —August and September, 1914?
A. Yes sir.
Q. And you were so occupying that position up to the time of the strike?
A. Yes sir.
Q. Did Richard Bray at any time report to you having received an injury by having a rock fall a distance of four or five feet and strike him on the head and knocking him down, rendering him unconscious, while in the employ of the Arizona Copper Company?
A. No, sir; he never did.
Q. Do you remember the last day on which Richard Bray worked for the Arizona Copper Company?
A. Yes sir; I remember the last day he came to work.
Q. Where had Bray been working immediately preceding the time he left?
A. He had been working all the time on the 130-foot level in the Eagle section of the mine.

Q. That was in the Humboldt Mine?
A. Humboldt Mine.
Q. How long had he been working at this particular place?
A. Well, I couldn't say exactly; about a month, I should think, a little more. He worked at that place all the time he worked, at that one level.
Q. Generally, what was the character of work he was doing?
A. He was repairing a tunnel there, a small tunnel.
Q. State how often you would have occasion to go to this place, or through the place, or by it, where Richard Bray was working.
A. Well, I go through there about four times a shift.
Q. Four times each day?
A. I beg your pardon?
Q. You go, there or by there, or past there, about four times a day?
A. Yes, I pass there. Sometimes it might be more.
Q. You were the shift boss on the shift upon which Mr. Bray worked?
A. Yes sir.
Q. In going to this place, or by it, did you or did you not have occasion to see or take notice of Richard Bray?
A. Yes sir; I was responsible for the work he was doing there.
Q. At any time prior to the day on which Mr. Bray laid off did you notice any peculiarity in his actions?
A. No sir; I never did.
Q. How did he seem with respect to being a normal man?
A. Well, he seemed to be all right to me, every time I saw him at work.
Q. He was doing his work properly?
A. Yes sir.
Q. Made no complaint to you?
81 A. No sir, he never made any complaint to me.
Q. Now, on the last day, on which Mr. Bray worked for the company, which you say you recall, did you have any conversation with him?
A. The last morning he came to work for me was—Yes.
Q. What was that conversation?
A. He told me he wasn't feeling well. His head was awful light.
Q. Speak slowly and loudly.
A. He wasn't feeling very well that morning. His head was awful light, he said, and he couldn't work very well, and he didn't think he would be able to work.

Mr. Curley:

Q. His head was light?
A. Yes sir; he said his head was light. I told him he had better go home if he felt he couldn't work. He said he would try it; he didn't want to lay off if he could help it. So he went up to the mine—I don't know; it couldn't have been very long; it might have been two or three hours, I went through the place where Mr. Bray had already been working in, and he had already gone home.

Mr. Elliott:

*A*. At that conversation did Mr. Bray say anything to you at all about having sustained an injury?

A. No sir; no.

Q. Did he sau anything at all about having been hit on the head with a rock and rendered unconscious?

A. No sir; he never said anything.

Q. What, if any, equipment exists about this place where Richard Bray was working for rescue work, of giving first aid to the injured?

Mr. Kearney: Objected to as immaterial.

The Court: I couldn't get all of that question.

(Question read.)

The Court: Objection overruled.

Mr. Elliott:

Q. Do you understand the question?

A. Yes sir. There was a first aid box on the same level where he was working, maybe one hundred feet away from where he was working.

Q. I will ask you what would be the thing done, as a common practice, in the mine at Morenci in the event that a miner or timberman was working with his helper, and in the presence of his helper the timberman should sustain such an injury as by being hit on the head with a rock and knocked unconscious for a period of, we will say, from five to ten minutes?

Mr. Curley: I object to that.

The Court: Objection sustained, because there is no testimony that the person injured in this case made any report of the injury or the accident, and therefore, nothing could have been done.

82 Mr. Elliott: My point was, in showing the equipment that was present and the general practice in such mines, that the general workmen are accorded first-aid to the injured.

The Court: I will permit you to show the equipment for the purpose of enabling the jury to consider that fact in connection with all the facts in the case; the fact that this man has been injured and needed assistance; that he could have gotten assistance at that time and place. But I think that is as far as I can go. I will sustain the objection to the last question.

Mr. Elliott:

Q. Was that the last time which you saw Mr. Bray when he quit work at the mine?

A. The last time I saw him on the property, yes.

Q. On the property?

A. Yes.

Q. Did you see him or have any conversation with him subsequent to that time?

A. Well, maybe a week after I went to his house. His brother told me he was sick and wasn't feeling good, and I went over and saw him one evening.

Q. Will you talk a little more loudly.

A. A week, it may have been four days or a week; I couldn't tell exactly, sometime after Mr. Bray was home his brother told me he was awful sick, and I went over to see him one evening, and he told me he was feeling bad in the head, but he never mentioned having got hurt to me in the mine, and no more than he said that he thought that the doctor—He said that he felt bad in the head, felt light in the head—was caused from some blow. So I asked Mr. Bray if he had had some pain in the head, and he said he did not remember except sometime before that, he didn't know exactly when, a little small rock had hit him in the hind part of the head. But he said he didn't think that had anything to do with the injury at all, or sickness then. That is what he told me there in his house that night.

Q. On what part of the head was it, on the back of the neck?

A. He said he remembered of a small rock striking him just in the back of the head there, just above the neck. It was a very small rock, he said. He didn't think that caused the injury to his head.

Q. That conversation took place two weeks after Mr. Bray had quit work for the company altogether?

A. Two weeks?

Q. Yes.

A. No, sir, I don't think it was quite two weeks after.

Q. How long was it?

A. It might have been a week; I don't know; I couldn't say exactly.

Q. About a week?

A. About a week, I should judge. I know it was several days after he had stopped *home.*

Q. Did Mr. Bray ever go back to work for the company after that conversation?

A. No sir: no; I never saw him no more after that.

Q. At that conversation you had at Mr. Bray's house probably a week after he quit work——

A. A week, sir.

Q. —he didn't tell you of having received an injury by having a rock fall four or five feet and strike him on the head, and knocked him down and rendered him unconscious.

83 A. No *wir*; he never did. He never reported anything of that to me at all.

Q. Have you any interest whatever in the outcome of this suit?

A. No sir.

Q. Have you ever talked to anybody about this suit?

A. No sir; no, I never talked to nobody about it, sir, no more than Mr. Kiddie asked me to come down here as a witness. That is all the talking I did.

Q. Your brother did?

A. Mr. Kiddie asked me to come here as a witness.

Q. You have talked with me about the suit?

A. Yes, I have.

Q. And Mr. Kearney?

A. Mr. Kearney—well, Mr. Kearney mentioned about it in Lordsburg in the morning while we were coming down.
Q. While you were coming over here?
A. Yes sir.
Q. Is anybody paying you anything to testify in this suit?
A. No sir.
Q. Your expenses are being paid?
A. Yes sir.
Q. You were subpœnaed by the defendant in this case?
A. Yes sir.

Mr. Elliott: That is all.

Cross-examination.

By Mr. Kearney:

Q. You don't claim that you told me anything about the case, do you?
A. No sir; I didn't tell you anything.
Q. Did you tell me what you have told here on the stand?
A. You asked me——
Q. Did you tell me anything about the case?

Mr. McFarland: I insist that the witness ought to be allowed to answer.
The Court: Let the witness answer the question.

A. You just asked me was I a witness in the Bray case, coming to Tucson, and I told you, yes, I was.

Mr. Kearney:

Q. That is all you told me then?
A. That is all I told you, sir. You tried to make me talk quite a bit.
Q. You didn't talk?
A. I didn't feel like talking.
Q. I thought so.
A. I was hungry that morning, and I wanted breakfast more than talking there.
Q. You did, since you have come here, you talked with Mr. Noah Green.
A. No sir; nothing about the case.
Q. I asked you if you have talked to him——
A. Oh, I have walked up and down the street here with Green, of course. I never talked nothing about no suit or no case whatever.
Q. Didn't you talk to him at the Santa Rita Hotel?
A. No sir, no. I have seen Mr. Green up there but I never did no talking to him about no case.
84 Q. Isn't it a fact the other day, the other morning, two mornings ago, I went up to the Santa Rita Hotel——
The Court: Mr. Kearney, I cannot hear a word you say when you put your hand up that way.

Mr. Kearney:

Q. Isn't it a fact that two mornings ago I went up to the Santa Rita Hotel and you and Mr. Green were sitting there on the settee talking?

A. Mr. Green and I might have been sitting there, but I wasn't talking with Mr. Green anything about this case.

Q. You were talking with Mr. Green, however?

A. Yes, I was talking with Mr. Green. I claim I have a right to talk to Mr. Green.

Q. Now, you are one of the officers of the Company, aren't you? You have charge there of the shift department?

A. Shift boss.

Q. Do you claim to be a physician?

A. Physician?

Q. Yes sir.

A. No, I am no physician, no.

Q. You think an injured employee should tell you his injuries so that you could treat him?

A. Yes sir; if he was hurt, he would.

Q. You think you could treat his injuries?

A. Well, I can do first-aid a little, enough to tie a man up if he is hurt and send him out for a doctor, in that way. I know sufficient for that, if he had a cut in the head or his hand was cut.

Q. Isn't it a fact that every time an employee gets injured up there that you officers go to everybody and try to get them to make a statement?

Mr. Elliott: I object to that question as being utterly incompetent, irrelevant and immaterial.

The Court: The objection is sustained.

Mr. Kearney: Isn't it a fact that in the interests of the Company, when an employee is injured, that you or one of the other officers go to that employee and try to get a statement as favorable as you can for the company?

Mr. Elliott: We object to that, your Honor, on the same ground. I believe that is an unfair, unjustified, unqualified imputation here.

The Court: I will sustain the objection. What is done in other cases in that regard has nothing to do with this case.

Mr. Curley: We are trying to show the interest that this witness has in the defense.

The Court: That is not the proper way to show it.

Mr. Kearney:

Q. When you called on Mr. Bray there didn't you call on him in the interest of the company?

A. In the interest of the Company? The company didn't know I was up there.

Q. His wife was present at this conversation?

A. Yes sir; Mrs. Bray was there when I came to see him.

85 Q. Mrs. Bray and Mr. Bray were present at this conversation?

A. Yes sir. Yes sir; I went there through his brother. Somebody—somebody told me his brother was sick, and I went over through my own kindness to see Mr. Bray, and to know what was the matter with him. Being a stranger in the camp—he hadn't been there very long—I thought it was proper to go and see the man, as his brother was all the time telling me every morning that he was awful sick. But the company never knew, none of the company never had any idea that I went to the house. I never thought of saying anything to the company about going to the house.

Mr. Kearney: That is all.
Mr. Elliott: That is all, Mr. Williams.
The Court: Call your next witness.
Mr. Elliott: I will call Doctor Butler.

JOEL I. BUTLER, M. D., called as a witness on behalf of the defendant herein, having been first duly sworn, was examined and testified as follows:

Direct-examination.

By Mr. Elliott:

Q. State your nome, Doctor.
A. Joel I. Butler.
Q. What is your profession?
A. Physician and surgeon.

Mr. Curley: We will concede that the Doctor is qualified to testify.

Mr. Elliott:

Q. Where are your practicing?
A. Tucson.
Q. What, if any, institution are you connected with here?
A. The Rodgers Hospital.
Q. Do you do any special line of work with the Rodgers Hospital?
A. Yes sir; surgical work.
Q. Doctor, what are the ventricles of the brain?
A. They are spaces inside of—cavities inside of the lobes of the brain.
Q. On the inside?
A. On the inside.
Q. How many of them are there?
A. There are four of them recognized. In all, there are five; two being part organs.
Q. Now, Doctor Root of Salt Lake City, Utah, who operated on Mr. Bray, the plaintiff in this case, has testified here that he operated upon Bray's head and removed a thin fluid from the left lateral ventricle of Mr. Bray's head,—brain. Now, I will ask you if there is any disease of the brain in which you have fluid or pus in these cavities of the brain?
A. Yes, there are several conditions in which fluid accumulates.

Q. State what, if any, diseased condition there is in which the fluid would accumulate in the cavities.

86 A. Well, there is an accumulation of fluid in these cavities known as internal hydrocephalis. There are various causes for this accumulation.

Q. What generally are the causes of this internal hydrocephalis?

A. The causes are classified as—the accumulation of fluid is due in the most common instances to increased production of this fluid, and some obstruction to the outflow of the fluid from the ventricles, or any obstruction to the outflow of this fluid from the ventricles. There is ordinarily a formation of this fluid in the ventricles, which is drawn off through different channels, and consequently, there is a certain normal amount kept in them constantly. Now, if for any reason there is an obstruction to this outflow, there is an accumulation takes place. Now this obstruction may be a mechanical one. These drainage channels may be plugged from various causes, and the increased secretion, increased production of this fluid has a number of causes, inflammation of the secreting surfaces of these cavities. It is seen in meningitis, cerebral spinal meningitis; there is always an increase if there is a condition present that causes an increased flow, as may be present from tuberculosis, syphilis, any irritating process going on in these cavities plus an obstruction to the outflow.

Q. Please state whether or not external head injury is recognized as a cause of internal hydrocephalis?

A. I never have known any such case, or seen any such causation given in the literature.

Q. In your experience, has an external head injury ever produced this disease of one of these cavities?

A. No, I stated that I had never seen it. It is not recognized as a cause.

Q. Then if you had a case where a thin fluid or a thin pus was found in a ventricle of the brain and there was no evidence of any external head injury, and you had no history of such injury, might not such condition—might not such thin fluid or thin pus be due to an internal hydrocephalis?

A. It could.

Q. In a disgnosis, Doctor, how do you distinguish between a brain abscess produced by an external injury to the head and a brain abscess produced by other causes?

A. Well, in the first place, you would look for evidences of external injury. The abscesses caused by external injury are most commonly located directly beneath the site of the injury. That would be one strong evidence. I say the evidence of injury to the scalp or skull would be a strong point in favor of injury being the cause.

Q. You mean by that, the appearance of scars indicating a cut or some evidence of abrasions or a blow on the head?

A. Yes sir?

Q. That is, being visual?

A. Yes sir.

Q. You could see it?

A. Yes sir.

Q. What, if any, part would the history related by the patient, history of the blow, play in the diagnosis?

A. Well, ordinarily, you would accept a patient's statement that there had been a blow, if he stated that there had been a blow you would accept that as truthful statement on his part, and assisting you in making the diagnosis. You would then examine the skull to see whteher there was evidence of injury.

87 Q. Now, if you had a brain abscess, diagnosing it, if you had no evidence of any external injury and you had no history of the injury, then would there be any other distinctive feature that might distinguish a brain abscess due to a blow on the heas from a brain abscess that was due to one of the many other causes you have enumerated?

A. Absolutely not.

Q. Now, Doctors Root, Evans and Galligan, all of Salt Lake City, and who operated on Bray, have testified that they found no evidence at all of an external injury to the head, even after shaving part of the scalp preparatory to performing the operation. As to the shaven part, no scar on the scalp was observable and no injury to the skull was to be seen. Now would or would not the absence of all evidence of such prior injury to the head cause you to entertain a doubt that Bray had received such an injury to his head; that is, by being struck on the head by a rock weighing forty-five or fifty pounds and falling four or five feet?

A. It would.

Mr. Curley: I object to that question as not *begin* predicated upon the evidence. They made no examination for the purpose of seeing whether there was a scar. The portion of the scalp that was shaven and laid back for the purpose of this operation isn't the portion of the scalp upon which he received his injury. The question is absolutely unfair and is not predicated on any evidence in the case.

Mr. Elliott: If your Honor please, I believe both Doctor Root and Doctor Ewing, the two big experts in this case, testified that they made the most careful examination and that they recognized the existence of the scar as one of the important diagnostic features.

The Court: I will overrule the objection. I believe the doctor has answered the question.

Mr. Elliott:

Q. It would create a doubt?

A. Absolutely; there would be no evidence to base a diagnosis of injury on.

Q. Now, Mr. Bray has further testified that his scalp was cut in two places by this rock. Now, do you consider it likely that those two cuts would heal and leave no scar whatever upon the scalp as evidence of that prior injury within two months and twenty-two days of the date of the injury?

A. The scalp would not heal without having a scar present any

more than any other tissue would; that is, I should expect to find a scar.

Q. And you would expect to find it particularly within that short period from the date of the injury?

A. More likely if it was a cut through the skin, I should expect it to be permanent, a permanent scar regardless of time.

Q. There has been evidenced introduced here, Doctor, to the effect that where they have conditions of this kind, as in Bray's head, an accumulation of fluid in the ventricle, or an abscess, that after it is drained and it has healed up there may be some possibility of a recurrence of the abscess, or the condition. Now, I ask you, as time goes on and there is no recurrence, as a point of fact, doesn't the possibility of the recurrence grow less and less?

88 A. Yes.

Q. Now, upon your knowledge of anatomy and surgery, would a lesion in the left lateral ventricle indicate a lesion in the motor area of the brain?

A. No, it is nowhere near the motor area of the brain.

Q. Now, evidence has been introduced here to the effect that epilepsy might be a result, or an after-condition, from this condition in Bray. I ask you if the probability of the happening of epilepsy, or of the having of fits, is likely by the fact that the motor areas of the brain have not been affected?

A. Yes sir.

Q. Epilepsy under such circumstances would not be likely or would it?

A. No, it would not occur, or it would be very improbable to occur.

Q. What percent of abscesses, Doctor, is caused by traumatism, external injuries and violence?

A. Abscesses in general or abscesses of the brain?

Q. Abscesses of the brain?

A. Various figures are given varying from one-fourth to one-half.

Q. What are the later statistics on that, if you know?

A. What is that?

Q. What are the later statistics on that, if you know?

A. Well, they are varying with the experience of the different men, and the regions which they are familiar with. That is—and the statements dating practically from the same period—of within five years—they differ. I say they differ from twenty-five to fifty per-cent.

Q. Are you familiar with Church & Peterson on Nervous Diseases?

A. I have used the book—used the text book.

Q. What estimate do they make in regard to the proportion?

Mr. Curley: I object to that, if the Court please, on direct examination.

The Court: Objection sustained.

Mr. Elliott: That is all.

Cross-examination.

By Mr. Curley:

Q. Doctor, this trouble in the brain that you say is caused by an over-production of fluid in one of the lobes, what do you say they call that?

A. It is usually spoke of as hydrocephalis.

Q. Hydrocephalis?

A. Yes.

Q. Is that of syphilitic origin?

A. It may be.

Q. Well, isn't it of syphilitic origin?

A. What is that?

Q. Isn't it of syphilitic origin?

A. I say it may be of syphilitic origin. There are various causes for it, one of which is syphilis.

Q. One of which is syphilis?

A. Yes.

Q. Now, what other causes produce this trouble?

A. Well, I have stated any irritative or inflammatory condition which affects the surfaces in these cavities producing or secreting this fluid may be the cause.

89 Q. From pyæmic conditions, you mean?

A. Any infections condition in which the pyæmic condition is an infections condition, may do so.

Q. Such as syphilis and tuberculosis? The percentage of brain growths arising from pyæmic conditions as compared with those arising from external injuries are inner ear injuries is very slight, is it not?

A. The percentage of growths due to injury and due to other causes—I didn't catch that question then.

Q. Well, I will get at it in another way. You say, Doctor, that brain abscesses are caused by external injuries or a hit on the head.

A. Yes.

Q. Say, about one-fourth to one-half, or cause about one-fourth to one-half of all brain abscesses?

A. Yes sir.

Q. Now, what percent of brain abscesses are caused by inner ear troubles?

A. Well, those are also—the figures also vary in those from—I would say the same—twenty-five to fifty percent. It depends on the location of the abscesses you are speaking about.

Q. Now, doesn't it run higher than that? Isn't it ordinarily considered that about two-fifths of all abscesses of the brain are due to the inner ear?

A. Two-fifths, well, that is from twenty-five to fifty percent.

Q. That is nearly fifty percent.

A. Two-fifths is forty percent.

Q. So that from twenty-five to fifty percent of all brain abscesses are caused by external injury and approximately forty percent are caused by inner ear troubles?

A. Yes, I think that is a fair statement.

Q. Then the balance would be distributed among all the other pyarmic conditions?

A. Yes sir.

Q. That you have mentioned?

A. Yes sir; all the other causes.

Q. In what manner, Doctor, does syphilis most commonly attack the brain?

Mr. Elliott: If the Court please, I think that question is improper cross examination. That was not gone into on direct examination.

The Court: Objection overruled.

The Witness: Your question w-s how does syphilis——

(Question read.)

A. Well, the most common syphilitic process is one attacking the blood vessels of the brain which should be considered in a discussion as a part of the——

Mr. Curley:

Q. Ordinarily is that found—are those troubles found deep in the brain or near the surface?

A. No, they are found throughout the blood vessels of the brain, some of which are on the surface and other- penetrate the substance of the brain.

Q. Isn't it a fact that they most frequently attack the meninges, or the outer portion of the brain, rather than to go in deeply?

90 A. I don't know that there is any difference, I am not familiar with the difference.

Q. In diagnosing a case of abscess of the brain, trying to ascertain its cause, what are the most promising differentiating features in the symptoms of a patient, between one affected with an abscess caused by syphilis or one caused from an outside external injury?

A. Well, of course, in the case of syphilis, you have no history of any injury. You would have that, in the first place. If the patient was coming to you and attempting to give you all the possible information that would lead to a diagnosis, in the first place, there would be no history of the injuries, which, as I have stated before, is one of the strong diagnostic points. The location of the abscess is another. In a case of an injury, you, in the first place, expect to find the abscess close to the point of injury. You expect to find some external evidence of injury, either of the scalp or of the bone, of the skull, and then evidence of inflammation, or sometimes inflammation elsewhere, and fever and rapid pulse, which you would look for. In syphilis you would find none of those conditions. In addition you would hope to get a history of syphilis, although many people have syphilis without knowing it. They may have had congenital syphilis. They may never have acquired it themselves.

Q. Isn't there any prominent symptoms differentiating between the two classes of abscess that would be readily noticeable in getting the history of his case, as to the way he would *fell?*

A. You are talking about an abscess following syphilis?

Q. Syphilis, syphilitic growth in the brain.

A. Syphilitic growth is what is known as a gumma, gummatas condition in the brain or the heart. To start with, or when it has developed — is a hard mass of tissue which gives no signs of abscess or simulating abscess, except possibly pressure symptoms. In the case of an abscess you would have pressure symptoms and in the case of syphilitic gumma you would have pressure symptoms. Then if the syphilitic process broke down and softened, which it might do, by the circulation being cut off by the syphilitic process, the areas which I spoke of before being involved, then a syphilitic growth would have been softened and you would get an accumulation of liquified material. But that wouldn't give any inflammation; it wouldn't give fever. It wouldn't give rapidity of pulse, or chills. In a case of abscess I would say you would look for it, unless in the case of the gumma where a secondary infection developed or appeared or came from somewhere else and attacked this low-grade tissue. This gummatous tissue is at low vitality and is very readily attacked by germs floating around in the blood. In that case you would have an abscess which could not be distinguished from any other abscesses.

Q. A stroke upon the head might produce a condition that would cause that to result in an abscess, might it not?

A. The stroke on the heas might injure the—injure the gummatous tissue, the syphilitic tissue, just as it might injure the other brain tissue.

Q. Otherwise, the gumma would probably not be noticeable at all; its existence there?

A. Well, except the fact it is a growth and it is practically a tumor, and you would get the signs of tumor and pressure.

91 Q. Well, now, to your mind then, as far as an examination of the patient is concerned, as to his symptoms, there is no prominent symptom that *ot* your mind would cause you to reach a conclusion as to whether the abscess was one of syphilitic origin or was caused by a stroke on the head?

A. Well, if the man presented the signs of an abscess, which are fever, and chills and elevation of pulse, and the same as inflammation anywhere else, you would not think of syphilis as being the cause, as being the most probable cause.

Q. Assuming that a man working in a mine in a tunnel was struck on the head by a flat stone with sufficient force to knock him down and render him unconscious for some five, ten, or fifteen minutes, but from which he recovered and experiences no further inconvenience other than the natural soreness resulting from such a blow, for four or five days, or probably a week, and assuming in about four or five days, or probably a week thereafter he begins to experience dizziness when walking and staggering unsteadily, which condition continues to grow gradually worse for approximately two weeks, when he is unable to longer continue work on account of such condition; and assuming that in about five or six weeks thereafter he is operated upon for an abscess of the brain, and an abscess is located and opened within a short distance, say, three or four inches of the place of injury; and assuming that he had theretofore been

in good health and had not within several years prior to such illness experienced any other injury or any other illness of any character to his knowledge; what in your opinion would have been the cause of that abscess?

A. Assuming all those things, I should think that the injury was a very strong possibility that the injury was the cause.

Q. You would have diagnosed it as such under those circumstances?

A. I should have diagnosed that as the most probable cause.

Q. If from his history it appears that he had not suffered any illness such a- syphilis or typhoid, or diseases of that kind, that would bring about a pyaemic condition, about the next thing you would look at would be his ear, wouldn't you, to see if he had any inner ear trouble.

A. I should always examine the ear.

Q. That would be one of the first things you would think about?

A. Yes sir.

Q. Because the greatest number of abscesses probably are due to inner ear trouble.

A. Yes, that is one of the most common causes.

Q. Now, you say, Doctor, that the trouble in the brain by reason of the clogging up of the passage of this fluid that you have spoken of may be due to any condition that would clog it up?

A. Yes.

Q. It isn't the existence of the fluid there that causes the trouble, as I understand?

A. No.

Q. But it is preventing that fluid from circulating around through the lobes of the brain, is that right?

A. Yes.

Q. Well, now, supposing that a man receives a blow on the head sufficiently heavy to cause the bursting of some of the little blood vessels in his brain, would it be possible for that blood clot
92 to bring about this condition that you have mentioned?

A. Well, it would depend entirely upon where the blood clot was.

Q. I know, but if it were in the right place it would produce such a condition?

A. A blood clot would, until it was absorbed, produce a plugging.

Q. Suppose, Doctor, that a man should come to you under the conditions that I have heretofore stated in my hypothetical question, and you diagnosed his case from the symptoms as being an ulcer of the brain, and suppose that he were suffering with constant headache throughout his brain, would that have any significance in diagnosing the character of ulcer that he was suffering with?

A. Character of abcess you mean?

Q. Yes, character of abscess.

A. Your question was assuming that this previous history——

Q. Yes, that you have concluded that it is an abscess.

A. Yes.

Q. Now, would that condition indicate to you the character of the abscess, whether it was caused from a syphilitic condition or whether from a stroke on the head?

A. Well, in other words, assuming that there was no other cause evident which——

Q. From which you would draw your conclusion as to the character of abscess.

A. Well, as you stated the question, there was no other cause present, you would necessarily have to diagnose it as trauma. That is the way you place the question.

Q. No, you misunderstand me. A man comes to you and you diagnose his case from his condition as an abscess of the brain.

A. Yes.

Q. Now, would the fact that he was complaining——

The Court: Pardon me, does *the* presuppose that he gives a history?

Mr. Curley:

Q. From the history, that you have diagnosed it as an abscess but are not sure as to the character of abscess or just what caused it, would the fact that he was suffering more or less constantly from a brain headache be in any manner indicative to you as to the character of abscess or as to what was the cause of it?

A. Absolutely not.

Q. That wouldn't make any difference?

A. No, absolutely not.

Q. Now, isn't it a fact that one of the most prominent symptoms frequently differentiating between syphilitic growths and other brain abscesses is the circumscribed limitation of the pain?

A. Not to my knowledge. Any intra-cranial pressure from any cause whatsoever would cause headache, and it is impossible to tell without other evidence what the cause of the headache is.

Q. Then, so far as you know, that is not a differentiating symptom?

A. It is not.

93 Q. Between the two. Are you acquainted with Bangs-Hardway's text book, American text-book on Syphilis and Diseases of the Skin?

A. I am not.

Q. You are not?

A. I have never opened the book as far as I know.

Q. You don't know whether that is a recognized text-book on that subject or not?

A. Bangs-Hardway—I know of the book as being a—yes, it is a recognized text-book.

Q. It is a recognized text-book?

A. Yes.

Q. Well, now, if it is set out in this Bangs-Hardway that the headache of a syphilitic growth—that one circumstance very often differentiating the pain of syphilitic growths from the headache

caused by other tumors is that—is a circumscribed limitation of the pain, would you say that that is a correct statement or not?

A. That the circumscribed——

Q. Limitation of the pain.

A. So far as I know, a circumscribed limitation of pain occurs in other conditions aside from syphilis.

Q. In other words, if there were a circumscribed limitation of the pain, that would indicate to you that the abscess was one other than of syphilitic origin?

A. No, I don't state that.

Q. I misunderstood you, then.

A. I stated that to me it would not—to me it would not indicate necessarily syphilitic conditions.

Q. If there were a circumscribed limitation?

A. No.

Q. Then you don't agree with this statement?

A. I do not.

Q. Do you know of any other feature, Doctor, that is prominently noticeable in cases of syphilitic growths inside the skull?

A. You mean any feature that distinguishes syphilitic from other growths?

Q. Yes.

A. I couldn't differentiate or distinguish without a history of possibly syphilitic infection.

Q. Isn't it a fact that a man suffering from a syphilitic growth in the brain, that is is always worse at nights?

A. Not to my knowledge.

Q. Then if Bangs-Hardway so stated you differ with them again?

Mr. McFarland: If the Court please, just a moment. That comes within the rule that the Court has established on that subject, and I object to it.

The Court: Yes I think the same ruling applies.

Mr. Curley: In cross examination as in direct examination?

The Court: Yes, because, if you were to invoke that rule as against the defendant only, the plaintiff on cross examination could read half the medical books on the subject by propounding questions and quoting authors.

Mr. Curley: There is a great deal of difference, if your Honor please, in testing an expert witness by his use of a text-book, and trying to introduce before the jury the contents of the
94 text-book by reading it to him. The purpose here is simply to test the knowledge of this witness.

The Court: In testing his knowledge you are reading from a book, reading to the jury.

Mr. Curley: From what he says is a recognized text-book upon the subject.

The Court: Yes, there is no question about that, but you are reading that book to the jury by asking your question, and I do not know of any rule which would allow the plaintiff on cross examination to introduce these medical books and not allow the defendant to

do it. The question has been passed upon. Go ahead. I am satisfied with the correctness of that ruling.

Mr. Curley:

Q. Are there any other distinguishing features, Doctor, to your knowledge, between abscesses due to direct infection and those resulting from pyæmic states and from virulent thoracic conditions?

A. No, nothing except previous history. There is no way of distinguishing except by previous history of the case.

Q. Isn't it a fact that abscesses due to direct infection are ordinarily single?

A. Yes, they are.

Q. And isn't it a fact that abscesses resulting from pyæmic states and from virulent thoracic conditions are usually multiple?

A. I should say not usually; they may be multiple.

Q. Aren't they usually multiple?

A. I am not aware that is the case. It is perfectly comprehensible that they may be multiple.

Q. Doctor, where would you expect to find an abscess caused by inner ear disease?

A. It would be most probably directly in from the ear, over the area of the brain known as the temporal lobe, and later gravitating backwards to the cerebellum.

Q. Would you find it in the cerebrum of the cerebellum?

A. Most probably in the cerebellum.

Q. Most probably in the cerebellum?

A. Yes.

Q. Abscesses in the ear?

Q. Yes. This might—you might have the same condition—might have the infection carried from the process in the middle ear, and being anywhere in the brain. It might be carried through the blood stream and distributed equally. It might be in one spot, which it usually is, or it might be in a dozen spots.

Q. But you would expect most pro-ably to find it in the cerebellum?

A. Most probably.

Q. Now state to the jury where the cerebellum—what part of the brain that is.

A. Well, the cerebellum is the portion of the brain situated just—a portion of the skull situated just above the neck inside the skull cavity, and just above the neck at the base of the brain. It occupies a separate cavity there, and there are tough fibrous walls or partitions which divide it from the other larger lobes known as the anterior brain or cerebrum.

95 Q. So, Doctor, there is really no connection between the point or cause of an abscess in the brain and the real location of the abscess?

A. Oh, yes, there is. The abscess is usually—following an injury, you stated?

Q. No, I am saying for any reason.

A. Yes, there is. If the cause—if, for instance, the cause is an

injury, the abscess is usually located right beneath the point of injury. If it is due to infection from the ear, it is usually directly in from the ear, going right straight through the skull in locating that abscess. If it is from a blood stream, brought from somewhere else, from an infected arm or infected lung, or elsewhere, it may be located anywhere in the brain. It may be, as I say, in a dozen different places, dozen different locations.

The Court: This is the correct rule of law we had up a few moments ago. (Reading.)

"It would be a mere invasion of the general rule under discussion if counsel were allowed on cross examination to read to the witness portions of such works and to ask if he concurred in or differed from the opinions therein expressed. Hence, it is not allowed."

Mr. Curley: I think that is all.

Redirect examination.

By Mr. Elliott:

Q. Doctor, where would you expect to find an abscess which was caused by a blow on the head, on the outside of the brain or on the inside, on the cortex or on the inside?

A. I would expect to find it in the cortex, either directly under the skull or in the brain tissue underlying the point of injury.

Q. You would not expect to find it in a ventricle?

A. How?

Q. You would not expect to find it in a ventricle?

A. No, that would be the last place I would usually expect to find it.

Q. What would you say as to the character of a blow, as to its severity, on the head, which would set up an abscess in a ventricle?

A. Well, the probabilities—that would set up an abscess in the ventricle?

Q. Yes.

A. Well, it would have to be an extremely severe injury.

Q. How as to incapacitating the victim?

A. Oh, I should expect it would be practically a fatal injury, or the man would be in a very—would be a very sick man.

Q. Would he be able to walk around within fifteen or twenty minutes following such an injury in your opinion?

A. No.

Q. And continue to work fourteen, fifteen or sixteen days thereafter?

A. If not killed at once, I should expect him to be immediately incapacitated.

Mr. Elliott: That is all.

96 Q. That is, in a case where an abscess was set up in a ventricle of the brain?

A. Yes.

Mr. Elliott: That is all.

Recross-examination.

By Mr. Curley:

Q. Any blow, Doctor, that would cause a bursting of one of the small blood vessels of the brain would produce that condition, though, wouldn't it?

A. Produce a bursting of the blood vessel where?

Q. In the brain, in the ventricle, in the lobe?

A. In the ventricle?

Q. If the blow was sufficient.

A. You say in the ventricle or in the lobe. Of course, they are entirely different.

Q. In the ventricle.

A. Well, an injury that would cause a bursting of a blood vessel in the ventricle would have to be, as I stated before, an incapacitating injury.

Q. I am not asking you that. I say if the blow caused the bursting of any of the small blood vessels, it might produce an abscess of the brain.

A. It might.

Mr. Elliott:

Q. It would be the last place where you would expect a blood vessel to burst, in a cavity?

A. Yes.

Q. And if it did burst it would necessitate a mighty serious, severe incapacitating blow?

A. A very severe one.

Mr. Elliott: That is all.

Mr. Curley:

Q. But severe or otherwise, if it did burst the blood vessels it would produce abscess.

A. It would not necessarily produce abscess.

Q. It could produce it?

A. It could produce an abscess. It would produce a hemorrhage which might become infected and produce an abscess.

Q. In other words, that is one of the conditions that would result?

A. That is one of the possibilities that would result.

Mr. Elliott:

Q. Isn't it very likely that a hemorrhage of the left lateral ventricle would be fatal?

A. Well, not necessarily the hemorrhage, but the injury accompanying—the injury to other portions of the brain accompanying a blow sufficient to cause a hemorrhage in the ventricle would probably produce death.

Mr. Curley: Not necessarily so.

The Court: That is all, you are excused, Doctor.

97 G. E. GOODRICH, M. D., called as a witness on behalf of the defendant herein, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Elliott:

Q. State your name, Doctor?
A. G. E. Goodrich.
Q. What is your profession?
A. Physician and surgeon.
Q. Where do you reside, Doctor?
A. Morenci, Arizona.
Q. Do you know Richard Bray, the plaintiff here?
A. Yes sir.
Q. Do you know the Arizona Copper Company, Limited?
A. Yes sir.
Q. I will ask you if you had occasion to make any examination of Richard Bray, the plaintiff here, prior to his going to work for the Arizona Copper Company?
A. Yes, I examined him.
Q. What was the nature of that examination?
A. Why, it is a routine examination made of all employees prior to going to work—a very superficial examination.
Q. What was its character? What do you do?
A. Well, that depends on the time that we have to make it. These men come up during office hours, and often perhaps there may be ten or a dozen of fifteen. We only ask them a few questions relative to their general health.
Q. What are the particular things to which this examination is directed?
A. The idea——

Mr. Curley: I object to that, if your Honor please. It has no place here. It is a question of whether he made an examination of the plaintiff and of what it consisted.

Mr. Kearney: Further, the relation of physician and patient I think will exist, and we further object to it on the ground of being privileged.

Mr. McFarland: If your Honor please, there is no relation of physician and patient in this case. He was not treating him, or called upon to treat him by Mr. Bray.

The Court: I don't understand. One counsel objects to it and that other says he should go on and tell it. Now, which objection shall I consider?

Mr. Curley: Consider them both. It is just another objection. Mr. Kearney simply added another objection to mine.

Mr. McFarland: Well, I say the objections are not tenable for the reason that the relation of physician and patient does not or did not exist. He was not called upon to treat him and never did treat him. We simply want to know his condition at that time, and what this ex-

amination covered, the extent of the examination. I do not think that comes within the rule generally, or even the rule as laid down by the Supreme Court of the United States in the Clark case. That relation must exist in order to be privileged, and could not exist where one voluntarily submitted himself to an examination
98 with a view to employment. That is not treatment.

Mr. Elliott. The further purpose of that examination, your Honor, is to apprise the employer of the condition of the person who is examined—to enable that person to determine whether he is going to hire him or not. The very purpose of it is to pass on what the doctor knows.

The Court: I will overrule the objection.

Mr. Curley: I think the reading of the question will show that it is irrelevant.

(Question read.)

Mr. Curley: That is the question I am objecting to. He hasn't been asked yet, "did you make an examination," or "Of what did that consist," or anything of the kind; but generally, what generally were the things to which it was directed.

The Court: No, I understood counsel to direct it to the examination to be made of this particular individual.

Mr. Curley: It isn't though.

The Court: If it isn't, I will sustain the objection to it.

Mr. Curley: That is my objection.

The Court: As to what examination he makes of other employees is immaterial.

Mr. Elliott:

Q. Was your examination, Doctor Goodrich, of this plaintiff, Mr. Bray, of such a character as would enable you to discover any particular mental or nervous disease that Mr. Bray might have been afflicted with?

A. No, it would not.

Q. What was the extent of your examination of Mr. Bray?

A. It extended to asking him regarding his general health, if he had a rupture, if he had ever had tuberculosis, or chronic colds, if he knew whether he had any trouble with his heart. That is about the extent of the examination of all employees.

Q. Tuberculosis of what, any particular—pulmonary?

A. Pulmonary type.

Q. Then such an examination is not calculated—does not extend far enough to discover any particular latent mental or nervous disease that might be present?

A. No, it would not discover—you couldn't discover any obscure disease by the examination we made.

Mr. Elliott: That is all.

Mr. Curley: That is all.

Mr. Elliott: We will call Doctor Rodgers.

99 MARK A. RODGERS, M. D., called as a witness on behalf of the defendant herein, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Elliott:

Q. State your name, Doctor.
A. Mark A. Rodgers.
Q. Where do you reside?
A. Tucson.
Q. Your profession?
A. Physician and surgeon.

Mr. Curley: We will admit the Doctor is disqualified.

Mr. Elliott:

Q. What, if any, institution are you connected with in Tucson?
A. Well, I am not directly connected with any now, except in a general way.
Q. Is there any particular limit, Doctor, any point of time of the developing of a brain abscess?
A. No, there is not limit, if I understand your question correctly I would say there would be no definite limit.
Q. A cause for an abscess might be set up, and that abscess might lie dormant or latent, or be developing over a period of a great many years?
A. Yes.
Q. As many as ten?
A. I presume so, but certainly for years.
Q. And such an abscess, under certain conditions, might be so developing and you not know that it was present?
A. It would give no symptoms; it wouldn't necessarily give symptoms.
Q. Until some stage in the process of development was reached where it was lighted up?
A. Yes.
Q. In your opinion and from your knowledge, can you state that the pus or contents of abscesses vary as to consistency, as to its being thick or thin, according to the length of time the abscess had been forming or running?
A. It is stated—I cannot say from personal experience, but I have read the statement as to the color and the consistency of the contents of brain abscesses, new and old.
Q. Describe the consistency of the contents of an abscess or abscesses with respect to their different ages, new and old?
A. In a new abscess you would expect to have the characteristics of fluid which would be the result of the traumatism, in case it were produced by a traumatism. In an old abscess, those conditions would disappear. It is stated with regard to brain abscesses that the longer the abscess exists the more apt the fluid is to become liquid—

the more apt the contents of the abscess is to become liquefied. It is stated by some authors—I have read the statement by some authors that it does not—that that rule does not necessarily follow. There are cases in which the substance remained thin, but in others it is stated that the contents of the abscess may be thick.

Q. Then would you think that in your opinion, where a thin fluid, a very thin pus is drained, that that thin consistency of the pus would indicate a long-standing abscess?

A. It would be more apt to indicate a long-standing, provided it is pus.

100 Q. I did not understand.

A. Provided it is pus.

Q. It is pus?

A. Yes; a thin fluid is not necessarily pus.

Q. I will base my question upon it being pus. If you had a case in which you found a collection of pus in the left lateral ventricle, would you be sure that you were dealing with an abscess of the brain at all?

A. I should first question that very decidedly.

Q. I did not understand your answer.

A. I should first question that very decidedly.

Q. Might it not be due to a diseased condition of the ventricle?

A. Yes.

Mr. Elliott: That is all.

Cross-examination.

By Mr. Curley:

Q. Doctor, what did you say your opinion is of the character of pus with reference to the age of the abscess?

A. It is more apt to be thin as time goes on.

Q. More apt to be thick?

A. Thin as time goes on.

Q. Do you mean that?

A. I certainly mean that; yes sir.

Q. You say you have read that such is the case?

A. I have read that, and I have experienced it in my own experience.

Q. You stated awhile ago that you had read that.

A. Yes.

Q. Now what books have you read that stated that?

A. Well, now, I cannot state definitely what authority, but I have seen that definitely stated in one of the well known authorities, either Osler or some other authority that I have read.

Q. Have you read Church & Peterson on Nervous and Mental Diseases?

A. No, I couldn't get that because the attorneys for the defense seemed to have it all the time.

Q. Because I had it?

A. Yes.

Q. You haven't read that?
A. No, I have not.
Q. You don't know what Church & Peterson says on that?
A. No, I can't say anything about it.
Q. That is a recognized authority?
A. Not that I know of.
Q. Oh, you don't know?
A. No, I don't know that it is.
Q. Why were you so anxious to get it?
A. Well, I wanted to see what you were reading?
Q. Did you know that I had the book when you started to look for it?
A. Yes, I saw you with it, yes.
Q. Didn't you go down to the Rodgers Hospital and try to find the book before you found I had it?
A. Afterwards. I first saw you with it.
Q. Did you know, as a matter of fact, that I had the book at that time?
A. Yes sir; I saw you with it.
Q. Prior to the time that you were down there looking for it?
A. Yes sir.
Q. You saw me with it?
A. Yes.

Mr. Curley: That is all.

101 Redirect examination:

By Mr. Elliott:

Q. Doctor, isn't it a fact that you wanted to be sure on that point and you did look up an authority on it?
A. Yes, I found that to be the case.
Q. You looked it up thoroughly?
A. Yes.

Mr. Elliott: That is all.

NOAH GREEN, called as a witness on behalf of the defendant herein, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Elliott:

Q. Give your full name to the Reporter, Mr. Green.
A. Noah Green.
Q. Where do you reside now?
—. Bisbee, Arizona.
Q. What is your occupation?
A. Miner.
Q. Where are you pursuing that occupation at the present time?
A. For the Copper Queen Mining Company in Bisbee.

Q. In Bisbee, Arizona?
A. Bisbee Arizona.
Q. Do you know the plaintiff here, Richard Bray?
A. I do.
Q. Do you know the Arizona Copper Company, Limited the defendant here?
A. I do.
Q. Were you at any time in the employ of the Arizona Copper Company, Limited?
A. I was.
Q. Where?
A. Morenci, Arizona.
Q. Speak toward the jury and a little louder, Mr. Green, please. Were you employed by the defendant company?
A. I was.
Q. Where?
A. Morenci.
Q. In what capacity?
A. As a miner.
Q. Did you know the plaintiff, Richard Bray, in Morenci, Arizona?
A. I did.
Q. Under what circumstances did you know him?
A. Why, he was timberman.
Mr. Curley: Speak up, Mr. Green, so we can hear you.
A. He was timberman in the Humboldt Mine, Morenci, Arizona.

Mr. Elliott:

Q. Did you do any work with him?
A. I did.
Q. How long did you work with him?
A. Well, about three or four weeks.
Q. Do you know how long Mr. Bray was in Morenci and working for the Arizona Copper Company?
A. Well, I don't know how long he was there before he went to work for this company, but from the time they started work there—with me, he was there about a month, I should judge.

Q. Mr. Bray has testified that he had a helper who worked
102 with him all the time, he worked in Morenci, as a timberman, and that that helper's name was Noah Green. Are you that person?
A. I am.
Q. I will ask you to state, Mr. Green, if you ever saw this plaintiff, Richard Bray, sustain an injury while working for this defendant company, and while you were working with him, by being struck with a rock, a rock falling and striking Mr. Bray upon the head, knocking him down and rendering him unconscious for a period of five or ten minutes?
A. I did not see him at the time that he was struck. My back was turned to Mr. Bray, and when he was struck he made some exclamation and called my attention. I turned around and Mr.

Bray was—seemed to be staggering around and seemed to be dazed, and I went to Mr. Bray and I asked him if he was badly hurt, and he—if I remember right, he said that he would be all right in a few minutes, or something like that, and in five or ten minutes he seemed to get better, and he went on and finished the shift.

Q. I asked you if you ever saw Mr. Bray struck on the head with a rock and rendered unconscious, knocked down on the ground?

A. I didn't see him struck.

Q. Did you see him lying on the ground unconscious?

A. I did not.

Q. Did you observe any wound or cuts in Mr. Bray's head?

A. I did not.

Q. Did he direct your attention, or did you direct his attention to any blood flowing from his head?

A. I don't remember of anything like that.

Q. At what time of the day was it, of this shift that you saw Mr. Bray stagger, as you testified?

A. Well, I am not exactly sure of the time, but I should judge it was about nine or ten o'clock in the morning.

Q. About nine of ten in the morning?

A. Along about that time.

Q. Are you positive that it was not just before going off shift in the afternoon?

A. Oh, I could not be positive about that.

Q. Was it when you were going off shift in the afternoon? What time did you go off shift, on the day shift?

A. Three thirty.

Q. Did this accident occur before or after lunch?

A. Well, I don't remember that.

Q. Your recollection is that it occurred in the morning?

A. In the morning, but I am not positive of that.

Q. Did you see Richard Bray fall down?

A. No.

Q. You didn't. Did you rush to his aid and pick him up, and as he says, place him to sit down on a log and ask him what was the matter?

A. No.

Q. You found no cut in Richard Bray's head?

A. No.

Q. I will ask you, Mr. Green, did you assist Mr. Bray outside of that tunnel in which you were working, and did you outside of that tunnel in the company of Mr. Bray meet a man by the name of William Jane?

A. I don't remember of anything.

Q. And did you then at any such meeting or any meeting with William Jane, in which you and Mr. Bray and William Jane
103 were present, tell William Jane that you had seen Richard Bray struck on the head with a rock and rendered unconscious for a considerable period?

Mr. Curley: Just a moment. I object to that. The witness says

he does not remember whether he was out there with those parties or not.

The Court: The objection is overruled, to the question as asked.

Mr. Curley: The former question, if your Honor please—in answer to it, he saus, "I don't remember." The question was "When you went out side did you meet Mr. Jane out there," and he said "I don't remember."

The Court: Well, they may call his attention to the fact.

(Question read.)

A. I did not.

Mr. Elliott: No such conversation ever took place? You never made such a statement?

A. No.

Q. Of your knowledge, Mr. Green, is the statement of Mr. Bray that after he was knocked down and rendered unconscious, and after he had recovered his consciousness, that you placed him to sit down on a piece of timber and felt of his head, examined him and asked him if he was badly hurt, true or untrue?

The Court: Although there is no objection to that question, I think it is improper. One witness should not be called upon to state whether or not another witness has falsified. He may state whether or not he did that.

Mr. Elliott:

Q. Did you do that, Mr. Green?

A. Well, I didn't do it, but I asked Mr. Bray, as I said a while ago, I asked him if he was hurt, *be* he was not unconscious.

Q. He was no- unconscious?

A. No, as I said awhile ago.

Q. Did you see him knocked down or lying down on the ground?

A. No.

Q. Did you rush to his aid and pick him up and place him to sit down on a log?

A. I went to him when I turned around and I saw him staggering, but he sat down on a piece of timber of some kind that was around close.

Q. Did you place him there?

A. I helped him to his seat.

Q. How soon did Mr. Bray at any time before or after that complain of dizziness?

A. If I remember right, it was two or three days.

Mr. Curley:

Q. After that?

Mr. Elliott:

104 Q. How long did Mr. Bray work after this incident that you have described here?

A. Well, I couldn't be positive about the time. It might have been two or three days—four or five.

Q. Was it two weeks or more?
A. I don't remember if it was.
Q. What, *is* any, statement did Mr. Bray make to you regarding what he thought was the cause of his dizziness?
A. Well, at one time Mr. Bray and I were talking. It was when he was complaining of feeling sick and the way he was, dizziness, and one morning, I remember, he says to me, he sais, "I believe it is the sulphur smoke." The sulphur smoke was awful bad around that morning.
Q. Did you hear or see any rock fall and strike Mr. Bray?
A. No.
Q. How did Bray get out that evening after this incident that you speak of?
A. Well, I don't remember exactly, but he walked out. I don't remember of assisting him, or anything like that, out.
Q. Were you subpœnaed by the plaintiff in this case?
A. I was.
Q. I will ask you, Mr. Green, did you see Bray lying unconscious on the ground there in that drift?

Mr. Curley: I object to that. It has been answered twice before.
The Court: He said he did not. That has been answered.

Mr. Elliott:

Q. You saw nothing fall or strike Bray?
A. No.
Q. You heard nothing fall or strike him?
A. No.
Q. How close were you to him?
A. Well, five or six feet.
Q. Five of six feet?
A. Yes sir.

Mr. Elliott: That is all.

Cross-examination.

By Mr. Kearney:

Q. You do remember of seeing him stagger, don't you, there?
A. I do.
Q. And you did assist him—you did hear him remark that he was struck on the head, didn't you?
A. I did.
Q. And you did assist him, didn't you?
A. I assisted him went to him and asked him if he was badly hurt, and I assisted him to a seat.
Q. He was stunned, wasn't he?
A. He seemed to be stunned, dazed.
Q. And you helped him to a log to sit down, didn't you?
A. Yes.
Q. You didn't make an examination of his head, did you?
A. No.

Q. You didn't make an examination of his head?
A. No.
Q. Now, isn't it a fact, Mr. Green that you don't remember very clearly what did happen? Ain't there lots of things that you have forgotten that happened there?
A. Well there are some things that are not exactly clear.
Q. I will ask you if you weren't examined in Mr. Curley's office Wednesday morning before Mr. Curley and myself, and a stenographer there, and questions asked you?
105 A. Mr. Curley asked me a few questions there.
Q. Yes, sir. I will ask you if this question wasn't then and there asked you, "Did you make an examination of his head," and didn't you then and there answer, "Yes, sir: I don't remember whether I did or not"?
A. Well, I just told you awhile ago that I didn't examine his head.
Q. And was the following question asked you, "A great many things happened in the mine, so you don't remember all things clearly," and your answer was "No, sir." Didn't you so answer?

Mr. McFarland: What are you reading from, Mr. Kearney?
Mr. Kearney: I am reading from his testimony.
Mr. McFarland: This witness's testimony?
Mr. Kearney: Yes, sir.
Mr. McFarland: Where was it taken?
Mr. Kearney: Taken by a stenographer in Mr. Curley's office.

Q. Didn't you make that answer to that *w*uestion?

Mr. McFarland: If the Court please, I object to that, if he made the statement to Mr. Curley. I understand that is what he is reading from—a conversation between him and the witness. I object to it. I don't know, and I don't know whether the Court knows what he is reading from, and under what circumstances these answers were made.
Mr. Kearney: I am just asking him if he made such answers.
The Court: Well, counsel stated—I suppose you did not hear it—that this witness was in Mr. Curley's office and that either Mr. Curley or Mr. Kearney asked him some questions and the questions and answers were taken down by a stenographer, and he is repeating to him certain questions and certain purported answers and asking him whether or not he made those answers.
The Witness: Will I answer that question?

Mr. Curley:

Q. You made that statement?
A. I believe I did.
Q. You did?
A. That——

Mr. Kearney:

Q. "You didn't think so much of the matter——

The Court: I think you had better ask him if the following ques-

tion wasn't asked and the following answer given, because you are simply reading what took place there, and the witness ought to know what was read.

Mr. Kearney:

Q. I will ask you if the following question was not asked you, and didn't you make the following answer: "Q. You didn't think so much of the matter? It passed out of your recollection."
106 And you answered, "Yes it passed out of my recollection"?
The Court: The question is did you or not make that statement in Mr. Curley's office.
A. I did.

Mr. Kearney:

Q. The following question was asked you and to which you make the following answer and I will ask you if you did so make it——

The Court: I decline to allow you——
Mr. Kearney: I beg your pardon.
The Court: I say I decline to allow you to examine this witness any further with reference to that conversation unless you put the questions—not read from the testimony, but put questions as you did before. Counsel have no right to say to a witness, "you said this, that or the other," because it makes counsel a witness.
Mr. Curley: That is all.
Mr. Kearney: That is all, Mr. Green.
The Court: Any redirect examination?
Mr. Elliott: That is all. That is our case, your Honor.
The Court: Anything in rebuttal?
Mr. Curley: We will recall Mr. Bray.

RICHARD BRAY, the plaintiff herein, recalled as a witness in his own behalf in rebuttal, having been previously sworn, further testified as follows:

Direct examination.

By Mr. Curley:

Q. Mr. Bray, you heard the testimony of Mr. Williams in which he said that he came to see you one evening, and in talking about the cause of your illness, you told him that you had a little stroke on the back of the head with a rock at some time. Did you have any such conversation?
A. I never told him that at all.
Q. You never had such a conversation?
A. I don't remember no such talk.
Q. Did you have any conversation such as related by Mr. Noah Green in the shaft or in the tunnel in which you were working, in the Humboldt Mine, where you told Mr. Green that you thought your sickness was caused by sulphur smoke?
A. No, sir.

Q. Was there any sulphur smoke in those workings at all?
A. No, sir.

Mr. Curley: That is all.

107 Cross-examination.

By Mr. Elliott:

Q. There is a good deal of sulphur smoke around town around Morenci, though, isn't there?
A. There is some around town.
Q. There is a good deal there, isn't there?
A. There is none in the mine, though.
Q. No, of course not, but there is down at the smelter and around the town.
A. Yes.
Q. Do you live down in the mine or do you live on top?
A. I live on top.

Mr. Elliott: That is all.

I. E. HUFFMAN, M. D., recalled on behalf of the plaintiff in rebuttal, further testified as follows:

Direct examination.

By Mr. Curley:

Q. Doctor Huffman, you heard the testimony of Doctor Rodgers in which he said that in new abscesses pus would be thick and in old abscesses it would be thin?
A. I did.
Q. Do you agree with the doctor upon that?
A. No, I do not, speaking of brain abscesses.
Q. Brain abscesses. Doctor, what is the condition of the pus in abscesses with reference to the age of an abscess?
A. Well, in abscesses, especially in the ventricle, would be—a recent abscess would be mixed probably a great deal more or less with the cerebro-spinal fluid, which is a fluid, and which would naturally be thin in a recent abscess.
Q. As the abscess ages, Doctor, what transformation is worked about in the character of the fluid?
A. Well, it would probably thicken as the addition to pus cells—lococytes, dead lococytes would be added, and would probably become more thickened and viscid.
Q. Apt to become more yellowish or greenish in color as it would get older?
A. Probably would.
Q. And become offensive?
A. Liable to, very liable to.
Q. Doctor, I will ask you to state whether or not Doctor Rodgers was mistaken about my having Church & Peterson on Mental and Nervous Diseases at the time he was searching for it in the Rodgers Hospital?

Mr. McFarland: If the Court, please, I object to his testifying as to Doctor Rodgers being right or wrong in his supposition.
The Court: That isn't the question he is asking.
Mr. McFarland: I so understood it.
The Court: No, he is asking the witness whether or not he was mistaken as to Mr. Curley having that book at a certain time.

108 A. He was.

Mr. Curley:

Q. Where was the book at that time?
A. In my desk.

Juror Moore:

Q. Where was it?
A. In my desk.

Juror Haskins:

Q. At the time he was searching for it, it was on your desk?
A. In my desk.

Mr. Elliott: In your desk.
Mr. Curley: I got the book afterwards.
Mr. Elliott: You still have it?
Mr. Curley: I still have it.

Mr. Elliott:

Q. Did you ever hear of injuries to the head being given as a cause for pus in the ventricles?

Mr. Curley: I object to that.
The Court: Read the question.
(Question read.)
The Court: Objection sustained.
Mr. Elliott: That is all.
The Court: Go to the jury.
Mr. McFarland: The defendant, in the presence of the Court and jury, before the jury has retired to consider of their verdict, moves the Court to direct the jury to return a verdict for the defendant on the following grounds:
First: because the evidence in the cause fails to show that the blow caused the abscess in plaintiff's brain.
Second, because from all the evidence in the cause a verdict and judgment should be for the defendant;
Third, admitting that plaintiff has established his case, as alleged in his complaint, he is not entitled to a verdict because the Employers' Liability Act, on which this action is bases, is unconstitutional in this: That said Act is in conflict with the Fourteenth Amendment of the Constitution of the United States which declares that no one shall be deprived of his life, liberty or property without due process of law; that the taking of property without fault is expressly prohibited under the Fourteenth Amendment;

Fourth, because the evidence in the cause shows that the accident and resulting injury was caused by plaintiff's own negligence.

The Court: Motion denied.

(Arguments to jury.)

109 The Court: Gentlemen of the jury, both parties are willing that you may separate until the morning. Therefore, I will not deliver the charge to you until that time, so that my interpretation of the law may be fresh in your minds at the time of the consideration of the case.

Now any misconduct on your part might cause a retrial of this case from the very beginning. And when I speak of misconduct, I do not mean any intentional misconduct, because I know you well enough to know that there would be no such misconduct. But you are to be careful not to violate any of the rules of the court, or violate the law unintentionally. That is, you must not under any consideration discuss this case even among yourselves between now and the time that you go into the jury room tomorrow morning. If two of you happen to meet you must not mention this case, or any subject connected therewith. You should not permit anyone to discuss it in your presence and hearing. Should anyone attempt to do so, it would be your duty to inform him that you are one of the jurors impaneled and selected to pass upon this case, and that he must not discuss it in your presence or hearing. Now, if such a one should persist in doing that, after being so warned, then it would be your sworn duty to report such a one to the court, because he would be guilty of contempt of court. I hope the time will come when a man will be just as free to discuss the facts of a case in the presence of a juror who has been selected to try it, as he would be to go to the judge and attempt to discuss the facts of the case with him. It is just as much a reflection upon your honor and your integrity, as it would be upon mine, or any other judge, who is sworn to administer the law.

Now, you must not read any newspaper accounts of this trial. Of course, I will not know whether you have or not, except that I have implicit confidence in your, and when I permit you to separate I shall rely upon you not to read any accounts, short or long, of this case, or any comments upon it at all. Every impression that you get of the facts of this case, or any subject connected therewith, should be gained here in the court room from the witnesses and the counsel and the court.

Now with these instructions you will be permitted to separate until tomorrow morning at half-past nine, at which time I will give you the charge, and you may retire and deliberate.

Court will be at recess until tomorrow morning at 9:30.

110 SATURDAY, December 4th, 1915—9.30 a. m.

The COURT: Gentlemen of the jury, this is an action brought by Richard Bray against the Arizona Copper Company to recover from said company the sum of $50,000 as damages for alleged personal injuries sustained by the plaintiff while in the employ of the de-

fendant company. The complaint, among other things, alleges in substance that on the 4th day of August, 1914, the plaintiff was employed by the defendant in its mine at Morenci, Arizona, and that on said day, while in said employment, and while engaged in work for the defendant, and acting within the scope of his duties, a large quantity of rock and earth fell upon and struck the plaintiff violently on his head, causing him to fall, and rendering him unconscious for a time, and producing in him a weak, giddy, nauseated and confused condition, and causing contusion, concussion and abscess of the brain, resulting in a paralysis of the nerves, loss of motor power, and permanently disorganizing his nervous system; that he is not now, nor will he ever be able to perform any kind of manual labor, and that his said injuries are permanent; that the said injuries were the result of an accident due to a condition of such occupation and employment, and were not caused by his own negligence. I have not stated the facts as proven on the trial, but merely what the plaintiff in his complaint claims were the facts.

The defendant in its answer admits that during all the times mentioned in the complaint it was a corporation, lawfully organized and doing business in Greenlee County, Arizona, and engaged in the business of mining, smelting and divers other business pursuits. The defendant also admits that on August 4th, 1914, plaintiff was employed by the defendant, and was in its employ, but the defendant denies that the plaintiff, while engaged in his work for the defendant, received the injuries mentioned and described in his complaint, and alleges that if he did receive any injury or injuries, they were the direct and proximate result of the plaintiff's own negligence.

This action is brought by virtue of the laws of the State of Arizona, by virtue of Chapter 6 of Title 14 of the Civil Code, Revised Statutes of Arizona, 1913, entitled "Liability of Employers for Injuries to Workmen in Dangerous Occupations," commonly called and generally known as the "Employer's Liability Act." Under the provisions of this Act an employer in certain hazardous occupations, among them mining, is liable for the personal injury of an employee by an accident arising out of and in the course of such labor, service and employment, and due to a condition or conditions of such occupation or employment, in all cases in which such injury of such employee shall not have been caused by the negligence of the employee injured. And in such case the employer is liable, even though he, himself be wholly free from any fault or negligence. I say, under such conditions as I have stated to you the employer is liable even though he himself be wholly free from any fault or negligence, provided, of course, that the injury of the employee shall not have been caused by his own negligence.

111 I charge you as a mattter of law that the occupation of the plaintiff on August 4th, 1914, if he was so employed, in or about the defendant's mine, is a hazardous occupation within the meaning of the Arizona Employer's Liability Law.

Now, gentlemen, it is your duty in this case to consider the evi-

dence in the cause as a whole, and not to give undue importance to minor points or portions of the evidence taken piece-meal. Any case involving much testimony and many facts should not be decided upon the probability or improbability of any point singled out of the evidence, but a proper decision requires due consideration to be given to all of the evidence, direct and circumstantial, in the case.

I charge you that you are made by law the sole judges of the facts in this case, and of the credibility of each and all of the witnesses who have testified in the case, and of the weight that you will give to the testimony of the several witnesses who have appeared before you. In determining the credibility of any witness and the weight you will give to his testimony, you have the right to take into consideration his manner and appearance while giving his testimony, his means of knowledge, any interest or motive which he may have, if shown, and the probability or improbability of the truth of his statements when considered in connection with the other facts and circumstances in the case.

If you believe that any witness has wilfully sworn falsely as to any material fact in the case, then you may entirely disregard such *tiu*ness's testimony except insofar as he may be corroborated by other credible evidence in the case, and by the facts and circumstances proven in the case. The legal presumption is that witnesses speak the truth, but this is but a prima facie presumption and may be repelled by the testimony and the demeanor of the witness.

It will be your duty in this case to be governed by the evidence which has been introduced before you and the law as herein given you, regardless of the condition of the parties hereto financially, and regardless of the effect of your verdict upon the parties, or either of them.

You are to look at the evidence in this case in a common-sense light, and to judge it by that experience and observation of human affairs of which you are possessed as individual members of society, and to endeavor to arrive at the truth as the evidence shows it to be.

I charge you that the burden of proof in this case is upon the plaintiff to establish by a preponderance of the evidence the mate*rail* allegations of his complaint, and if he has failed to do so he cannot recover. Now by a preponderance of the evidence I mean the greater weight of the evidence. It does not necessarily mean that a greater number of witnesses shall be produced upon one side or the other. It means the more convincing force, or the greater probability of the truth of the evidence on one side when compared with, or weighed against the evidence of the opposition.

112 By burden of proof wherever used in these instructions is meant this: that the party upon whom the burden of proof devolves must prove or make out his contention by a preponderance of the evidence, as I have heretofore defined that term for you.

The first question to be presented to you for your consideration and determination is whether the plaintiff, Bray, at the time and

place mentioned in the complaint, and while in the service or employment of the defendant, and in the course of his labor, received the injuries, or any of the injuries mentioned and described in the complaint. If you answer this in the affirmative; that is, that the plaintiff in the course of his labor and while in the service and employment of the defendant, received the injuries complained of, or any of such injuries, then you will determine whether such injuries so received by the plaintiff were due to a condition or conditions of his occupation and employment, and if you believe from the evidence in this case that the plaintiff was so injured as alleged in his complaint, and that such injuries were suffered or caused by an accident arising out of such labor, service and employment, and that the same were due to a condition or conditions of such occupation or employment, then you must consider and determine whether or not such injuries were caused by the negligence of the plaintiff, Bray; because if such injuries were caused by the negligence of the plaintiff himself, then he cannot recover in this action, and your verdict must be for the defendant. I say, gen*eltmene*, if you come to this conclusion; that is, that the injury or injuries alleged and mentioned in the complaint, and alleged to have been sustained by the plaintiff were caused by the plaintiff's own negligence, then he cannot recover in this action, and you need not go any further in the case. You stop right there and return a verdict for the defendant.

Now the word "negligence" has been used a number of times in argument and in these instructions. By negligence is meant the want of reasonable and ordinary care which, under the same conditions and circumstances would be exercised by persons of ordinary prudence and foresight. Negligence may consist of an act or of a failure to act. It is therefore such an act as a person of ordinary care under existing conditions and circumstances would not do, or such a failure to do something which under the existing conditions and circumstances a person of ordinary care would have done. Or, as the Supreme Court of the United States has said, "Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such person under existing circumstances would not have done. The essence of the fault may lie in omission or commission—the doing or the failure to do. The duty is dictated and measured by the exigencies of the occasion." In no event can the plaintiff recover unless he has established by a preponderance of the evidence that the alleged injuries sustained by him were not cau-ed by his own negligence.

Therefore, if you believe from the evidence that the plaintiff's injuries were caused by his own negligence, or if he has failed to establish by a preponderance of the evidence that the injuries complained of, if any, were not caused by his own negligence, then your verdict must be for the defendant.

113 You are further instructed that the law under which this action is brought bases the liability of the defendant company for damages solely upon the fact that the accident and the resulting

injuries were due to a condition or conditions of a hazardous occupation of an employee in the service of such employer in said hazardous occupation. Now, so far as I am advised, that term has never been defined, and I have not found anyone who seems to know what that means. I do not know that I clearly understand exactly what it does mean, but I will give you what I believe is the meaning of the term, "condition or conditions of employment." The terms "condition or conditions of employment", as used in the Arizona Employers' Liability Act, mean a situation *of* succession of situations, raising in the progress of the work being done by the employee which may endanger the life or safety of the employee, whether arising from the negligence of the employer or otherwise. It includes all such situations as should or might be foreseen, or such as might in the ordinary course of events come about, but does not include those extraordinary occurrences or situations which would not naturally be brought about even by the negligence of the employer, and which could not, by the exercise of the highest degree of prudence and foresight, have been foreseen.

Now, gentlemen, if you find from the testimony that the plaintiff at the time and place mentioned in the complaint sustained any of the injuries set out in the complaint, and that such injury or injuries were not caused by, or were not the result of his own negligence, you will next consider and determine the nature and extent of said injuries so sustained. I have already stated to you that the defendant in its answer denies that the injuries so sustained by the plaintiff were either of the nature or the extent as set out in the complaint. This is a point for you, the jury, to determine—the nature and extent of the injuries, and in this connection, the burden of proof is upon the plaintiff to show by a preponderance of the evidence that the injuries, defects and afflictions of which he complains, or some of them, are the proximate result of said accident. All of the injuries for which you award damages to the plaintiff, if you award any damages, must by a preponderance of the evidence, be shown to have been sustained as a natural and proximate result of said accident, and, of course, plaintiff cannot recover for any injury or injuries other than those shown to have been sustained at the time and place mentioned in the complaint.

Before I proceed further, gentlemen, I perhaps should state that if the plaintiff has sustained the injury or injuries mentioned and described in the complaint, and under the conditions which I have heretofore stated, and while in the service of the employer, and that it was due to a condition or conditions of such service and employment, the question as to whether or not the employer, the company, was negligent is not a material question in this case, because if the injury or injuries were so received under such circumstances, and if the plaintiff himself was not guilty of negligence, then, as heretofore stated to you, the defendant is liable, notwithstanding the fact that the defendant, the company, was guilty of no fault or negligence whatever.

114 As above stated, you are made the sole judges as to the extent or degree of the injuries, if any, so sustained; that is, as

to whether or not they are—permanent in character, and as to what extent, if any, by reason of such injuries, plaintiff has suffered mental or physical pain and anguish, or both; also, as to what extent, if any, he has been by reason of such injuries crippled or disfigured, and as to what extent, if at all, by reason of such injuries so sustained he has been disabled and incapacitated from following his usual vocation as described in the complaint—the vocation of a miner—and as to whether or not the incapacitation, if any, is permanent or merely temporary.

All of these points, gentlemen, go to make up the nature and extent of the claim -or alleged injuries, and should you award plaintiff damages in any amount, it is your duty to consider each and every one of these points as a factor in computing the award. If you award damages to the plaintiff in this case, in addition to the factors I have just mentioned, you will also make due and adequate allowance for the reasonable value of time lost by the plaintiff, if he has lost any time as a result of said injury or injuries, from August 4th, 1914, to this date.

In the ascertainment of damages, the law does not lay down any definite, mathematical rule. It says that you, the jury, must be governed by sound sense and good judgment, and make such award of damages, if any, as would be just compensation. The testimony in this case shows that the plaintiff is forty-nine years of age, and testimony has been received for the purpose of showing that the probably duration of the life of a person of forty-nine years of age is twenty-one and six-tenths years. This testimony was based upon the American Mortality Tables, which are framed upon the basis of the average duration of the lives of a great number of persons, but it has been held that the rules to be derived from such tables may not be the absolute or sole guides of the judgment and conscience of the jury in cases of this character. It may, however, be considered by you in connection with all the other evidence in the case.

You are instructed that the law does not place a liability upon the defendant for every infirmity, illness, impairment or disability that may have arisen in Richard Bray, the plaintiff, during his employment by the defendant. To recover for any infirmity, illness, impairment or disability, if any that you may find to have arisen or developed in the plaintiff during his employment by the defendant, the plaintiff must prove by a preponderance of the evidence that such condition resulted directly and proximately from an injury or injuries or accident sustained by the plaintiff while in the defendant's employ, and due to a condition or conditions of plaintiff's occupation with defendant, and that arose out of and in the course of the plaintiff's employment.

As above stated, if you find for the plaintiff, you should award a fair and reasonable compensation—no more—taking into consideration what the plaintiff's income would probably have been, how long it would have lasted, whether he would probably have had permanent employment during the balance of his expectancy of twenty-one and six-tenths years; whether or not he would have remained in health and capable of doing work during

all those years, the condition of his health and all the contingencies to which it was liable, such as illness, failure to obtain employment, and all those things. Such award or compensation, if any you give him, must not in any event exceed the amount claimed in plaintiff's complaint. If you find that the plaintiff is entitled to recover in this action, the amount of recovery, if any, is for you to determine from all the facts in the case. Of course, you cannot measure in dollars and cents the exact amount to which he is entitled, if any, but it is for you to say in the exercise of a sound discretion from all the facts in the case, after considering and weighing all the evidence produced before you, without fear and without favor and without passion and prejudice, what amount of money will reasonably compensate him for the damages, if any, he has sustained.

You decide this case as you would were it a case between two individuals. If you find for the plaintiff in this case under the instructions given you by the court, and find that the plaintiff has sustained damages as set forth in his petition or complaint, then to enable you to estimate the amount of such damages, it is not necessary that any witness should have expressed an opinion as to the amount of such damages, but you may yourselves make such estimate from the facts and circumstances in proof, and by considering them in connection with your knowledge, observations and experience in the ordinary every-day affairs of life.

If, under the facts in this case and the law as I have stated it to you, you come to the conclusion that the plaintiff is entitled to recover some amount as compensation for the injuries he has sustained, if he has sustained any, you must not render what is known as a quotient verdict, that is, you must not add together the amount of the sums which each of you believe the plaintiff is entitled to and divide by twelve or any other number. Such or any similar method of arriving at plaintiff's compensation would be unlawful, and the court would be compelled to set aside the verdict.

Now, gentlemen, you have hea-d all the facts in this case and the argument of counsel, and it is for you to pass upon the facts under the instructions which I have given you. If you find for the plaintiff the form of your verdict will be "We, the jury, duly empanelled and sworn in the above entitled cause, upon our oaths, do find for the plaintiff and assess his damages at —Dollars," inserting the amount which you determine he is entitled to. If you find for the defendant the form of your verdict will simply be, "We, the jury, duly empanelled and sworn upon our oaths, do find for the defendant." You will cause your foreman to sign the verdict which represents your conclusions and return it into court.

Are there any exceptions on either side?

Mr. McFarland: If the Court please, we except to that part of your Honor's charge in the court's definition of "condition or conditions" caused by the negligence of the defendant or otherwise, on the ground that negligence is not a factor in the case, nor is the liability based upon negligence so that a charge that it was caused by the defendant's negligence or otherwise,

116

we think is error, and ask the court to give us an exception to that instruction.

The Court: Very well. Let the exception be noted. Swear a bailiff.

Bailiff sworn.

The Court: Gentlemen of the jury, you will not separate during the time that you are deliberating unless by order of the Court. You may retire.

*Certificate.*

I, H. C. Nixon, do hereby certify that I was present in the above-entitled court on Thursday, December 2nd, Friday, December 3rd, and Saturday, December 4th, 1915; that I took down in shorthand all the questions propounded to the several witnesses and their answers thereto, as well also as all offers of proof, documentary evidence, objections, remarks and exceptions of counsel, and all rulings, opinions and instructions given or rendered during the trial thereof by the judge presiding at the trial, and that I have transcribed the said shorthand notes so taken by me, and that the foregoing eighty-seven pages of typewritten matter contain a full, true and correct transcript of the said shorthand notes so taken by me, and that they contain all the oral evidence given in the trial of the said cause.

Dated at Tucson, Arizona, January 6th, 1916.

H. C. NIXON.

117 And the foregoing was all the evidence given, introduced, heard and exhibited at the trial of said cause.

Be it further remembered, that during the trial of this cause the following proceedings among others were had.

I.

Dr. Meade Cline being on the witness stand and having been duly sworn as a witness for the plaintiff, was asked by plaintiff's counsel, the following question (p. 31):

"Assuming, Doctor, that a man working in a tunnel, in a mine, is struck on the head by a falling stone with sufficient force, and of sufficient size to known him down and stun him for some five, ten or fifteen minutes, but from which he recovers and experiences no further inconvenience other than the natural soreness resulting from such a blow, for four or five days, or possibly a week, thereafter; and assuming that in about four or five days, or possibly a week thereafter he begins to experience dizziness when walking, and staggering unsteadily, which condition continues to grow gradually worse for approximately two weeks, when he is unable to longer continue work on account of such condition; and assuming that in about five or six weeks thereafter he is operated upon for an abscess of the brain, and the abscess located and opened within a short distance, say three or four inches of the place of injury; that he had there-

tofore been in good health and had not within several years prior to such injury experienced any other injury or illness of any character, to his knowledge; what in your opinion would have been the cause of such abscess?"

To which said witness was permitted over defendant's objection to answer (p. 32):

"The cause would most probably have been the injury that he received."

118 Defendant objected to said question before said witness answered, upon the ground that said question is a hypothetical question so framed as not to be based upon evidence then before the court and jury, and as stating and assuming facts that were not in evidence and that were contrary to the evidence given by the plaintiff. That the court thereupon overruled defendant's objection to said question, to which ruling of the court, defendant then and there excepted and still excepts, which said exception was allowed.

II.

Dr. Meade Cline being on the witness stand and having been duly sworn as a witness for the plaintiff, was asked by plaintiff's counsel, the following question (p. 33):

"Assuming, Doctor, that a man working in a tunnel in a mine is struck on the head by a falling stone with sufficient force to knock him down and rendered him unconscious for some five, ten or fifteen minutes, but from which he recovers and experiences no further inconvenience other than the natural soreness resulting from such a blow, for four or five days, or probably a week; and assuming that in about four or five days, or probably a week thereafter he begins to experience dizziness when walking, and staggering unsteadily, which condition continues to grow gradually worse for approximately two weeks, when he is unable to longer continue work on account of such condition; and assuming that in about five or six weeks thereafter he is operated upon for an abscess of the brain and an abscess is located and opened within a short distance, say, there or four inches of the place of injury; in your opinion would it have been necessary that the stroke upon the head that I have just mentioned should have left a permanent scar upon the scalp in order to have been of such character or such force as to have resulted in or produced the abscess that I have just mentioned?"

To which said question said witness was permitted over defendant's objection to answer, p. 34:

"I think that could happen without necessarily leaving a scar."

That defendant objected to said question before the witness
119 answered and upon the ground that said question is a hypo*teh*tical question so framed as not to be based upon evidence then before the court and jury, and as stating and assuming facts that were not in evidence and that were contrary to the evidence given by the plaintiff. The court thereupon overruled defendant's objection to said question, whereupon defendant then and there excepted and still excepts, which exception was allowed.

III.

Dr. Meade Clyne being on the witness stand and having been duly sworn as witness for the plaintiff, was asked by plaintiff's counsel, the following question (p. 35):

"What, in your opinion, Doctor, is the effect upon the brain of an abscess on the brain which has been opened and drained?"

To which said witness was permitted over defendant's objection to answer (p. 35):

"The effect would be a destruction of some of the nerve cells and the adhesions that would result in the drainage of such an abscess—adhesions between the fura."

That defendant objected to said question before the witness answered and upon the ground that the same was incompetent, irrelevant and immaterial, for the reason that said question seeks to ascertain the effect upon the brain of an abscess of the brain which has been opened and drained, without limiting the question to the particular part of the brain, in which this plaintiff was alleged to have sustained an abscess and the effect upon plaintiff's brain of an abscess opened and drained in that particular region. The court overruled defendant's said objection to which ruling of the court the defendant then and there excepted and still excepts, which exception was allowed.

120 IV.

Richard Bray being on the witness stand and having been duly sworn as a witness and having been called by defendant for purpose of cross-examination under the Statute of the State of Arizona in such case provided, was asked by defendant's counsel, the following question (p. 47):

"Whose doctors did you consider Drs. Goodrich and Stanton when you consulted them?"

To which question plaintiff objected, which objection was sustained by the court, to which ruling of the court defendant then and there excepted and still excepts, which said exception was allowed.

That this defendant sought by said question to have this plaintiff testify whose doctors he considered Drs. Goodrich and Stanton, who examined him at the Town of Morenci, County of Greenlee, State of Arizona, shortly after the alleged injury of plaintiff, for which recovery was sought herein.

V.

Richard Bray being on the witness stand and having been duly sworn as a witness and having been called by defendant for purposes of cross-examination under the Statute of the State of Arizona in such case provided, was asked by defendant's counsel, the following question (p. 47):

"Now, Mr. Bray, I will ask you this question: When you first went to see Doctor Goodrich, is it not a fact that upon repeated

questionings by him as to whether you had received a head injury, you did not deny receiving those injuries?"

To which question plaintiff then and there objected, which objection the court sustained. That defendant then and there excepted to the ruling of the court and still excepts, which said exception was allowed.

121

VI.

Richard Bray being on the witness stand and having been duly sworn as a witness and having been called by defendant for purposes of cross-examination under the Statute of the State of Arizona in such case provided, was asked by defendant's counsel, the following question: (p. 49.)

"I will ask you, Mr. Bray, if on the taking of your deposition in Salt Lake City in October of this year you weren't asked if, when you went to see the doctors in Morenci, upon repeated questioning, if yoou had received such an injury, you didn't deny having received that injury; and did not you reply that you might or might not?"

To which question plaintiff then and there objected, which said objection was by the court sustained. That defendant then and there excepted to the ruling of the court and still excepts, which said exception was allowed.

VII.

That at the conclusion of all the evidence in the case and before the court had instructed the jury and before the jury had retired to consider of their verdict, defendant moved the court that a verdict be directed in behalf of this defendant on the following grounds: (p. 80.)

First. Because the evidence in the cause fails to show that the blow caused the abscess in plaintiff's brain.

Second. Because from all the evidence in the cause a verdict and judgment should be for the defendant.

Third. Admitting that plaintiff has established his case as alleged in his complaint, he is not entitled to a verdict for the reason that plaintiff's case is predicated upon the Employers' Liability Act of the State of Arizona, which is unconstitutional in this: That said act is

122 in conflict with the Fourteenth Amendment of the Constitution of the United States, which declares that no one shall be deprived of his life, liberty or property, without due process of law; that the taking of property without fault is expressly prohibited under the Fourteenth Amendment.

That the court overruled and denied defendant's said motion, to which ruling of the court defendant then and there excepted and still excepts, which said exception was allowed.

VIII.

That at the conclusion of the evidence in the case, the court instructed the jury among other things, as follows: (p. 85.)

"You are further instructed that the law under which this action is brought bases the liability of the defendant company for damages solely upon the fact that the accident and the resulting injuries were due to a condition or conditions of a hazardous occupation of an employee in the service of such employer in said hazardous occupation. Now, so far as I am advised, that term has never been defined and I have not found anyone who seems to know what that means. I do not know that I clearly understand exactly what it does mean, but I will give you what I believe is the meaning of the term, "condition or conditions of employment". The terms "condition or conditions of employment", as used in the Arizona Employers' Liability Act, mean a situation, or succession of situations, arising in the progress of the work being done by the employee which may endanger the life or safety of the employee, whether arising from the negligence of the employer or otherwise. It includes all such situations as should or might be foreseen or such as might in the ordinary course of events come about, but does not include those extraordinary occurrences or situations which would not naturally be brought about even by the negligence of the employer, and which could not, by the exercise of the highest degree of prudence and foresight, have been foreseen".

That defendant then and there in the presence of the court and in the presence of the jury, and before the jury had retired to consider of their verdict, excepted to said instruction of the court, for the reason that said instruction erroneously defined to the
123 jury what in law is a condition or conditions of the occupation of the plaintiff, out of which it was alleged plaintiff's injury arose. That said definition and instruction were erroneous in this, that the jury were instructed that a condition or conditions of employment means a situation or succession of situation- arising in the progress of the work being done by the employee which may endanger the life or safety of the employee whether arising from the negligence of the employee or otherwise; that the negligence of the employer and of the plaintiff herein was not and is not a factor or a part of the condition or conditions of the employment of plaintiff, and that the negligence of this defendant was not a factor or an element to be considered at all in plaintiff's case predicated solely upon the Employers' Liability Act.

And the defendant prays that this its bill of exceptions may be allowed, settled and signed.

W. C. McFARLAND,
H. A. ELLIOTT,
*Counsel for Defendant.*

Settled and allowed this 4th day of March, A. D., 1916, in term.
WM. H. SAWTELLE, *Judge.*

Endorsements: In the United States District Court in and for the District of Arizona. Richard Bray, Plaintiff, vs. The Arizona Copper Company, Limited, a corporation, Defendant. No. 44 Tucson. Defendant's Proposed Bill of Exceptions. Filed this 4th day of March,

A. D., 1916. Mose Drachman, Clerk, By Effie D. Botts, Deputy Clerk. Received copy within defendant's proposed bill of exceptions this 1st day of March, A. D., 1916. Frank E. Curley, Counsel for plaintiff. W. C. McFarland, H. A. Elliott, Counsel for Defendant, Clifton, Arizona.

124 In the District Court of the United States in and for the District of Arizona.

THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Plaintiff in Error,

vs.

RICHARD BRAY, Defendant in Error.

*Petition for Writ of Error.*

The above-named Plaintiff in Error, The Arizona Copper Company, Limited, a Corporation, respectfully shows that the above-entitled cause is now pending in the United States District Court, in and for the District of Arizona, and that judgment has therein been rendered, on the 4th day of December, 1915, upon a verdict of the jury, duly empaneled in the cause, and in favor of the Defendant in Error, Richard Bray, and against The Arizona Copper Company, Limited, for the sum of Nine Thousand ($9,000) Dollars and costs; that on the 14th day of January, 1916, Plaintiff in Error, The Arizona Copper Company, Limited, filed its petition for a new trial in the above-entitled cause, which said petition for a new trial was by this court denied on the 29th day of February, 1916; and that this cause is a proper cause to be reviewed by the Supreme Court of the United States on writ of error.

Wherefore, The Arizona Copper Company, Limited, prays that a writ of error may issue in this behalf to said United States District Court, in and for the District of Arizona, and that the Clerk of said United States District Court, in and for the District of Arizona, be authorized and directed to sign, seal and issue said writ of error, and that said Clerk be further directed to send the records and

125 proceedings of this cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by said Plaintiff in Error may be reviewed, and is error be found, corrected according to the laws and customs of the United States.

And your Petitioner will ever pray.

W. C. McFARLAND,
H. A. ELLIOTT,
*Attorneys for Plaintiff in Error.*

Approved March 4th, 1916.

Petition granted and writ of error allowed on giving bond in the sum of Twelve Thousand ($12,000) Dollars, conditioned as the law directs, this 4th day of March, 1916.

WM. H. SAWTELLE,
*Judge of the United States District Court in and for the District of Arizona.*

Endorsements: No. 44 Tucson. In the District Court of the United States for the District of Arizona. The Arizona Copper Company, Limited, a corporation, Plaintiff in Error, vs. Richard Bray, Defendant in Error. Petition for Writ of Error. W. C. McFarland and H. A. Elliott, Attorneys for Plaintiff in Error. Filed March 4, A. D., 1916. Mose Drachman, Clerk. By Effie D. Botts, Deputy Clerk.

126 In the District Court of the United States in and for the District of Arizona.

THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Plaintiff in Error,
vs.
RICHARD BRAY, Defendant in Error.

*Assignment of Errors.*

Comes now The Arizona Copper Company, Limited, a corporation, by its attorneys, W. C. McFarland and H. A. Elliott and in connection with its petition for a writ of error herein, makes the following assignment of errors, which it will urge upon the prosecution of the said writ of error in the above-entitled cause, to-wit:

I.

Because the court erred in overruling plaintiff in error's general demurrer, demurring to defendant in error's complaint on the ground that said complaint does not state facts sufficient to constitute a cause of action against this plaintiff in error.

II.

Because the court erred in overruling plaintiff in error's special demurrer No. 1, demurring to defendant in error's complaint on the ground that it appears upon the face of said complaint, in fact it is admitted by the defendant in error, as shown by the record, that defendant in error seeks to recover judgment against plaintiff in error under and by virtue of the provisions of Chapter VI of Title XIV, Revised Statutes of Arizona, 1913, known as the Employers' Liability Law, enacted pursuant to the provisions of Section VII of Article XVIII, of the Constitution of the State of Arizona, without any charge or showing of negligence, wrong or default on the part
127 of this plaintiff in error, causing or contributing to defendant in error's alleged injury; and that said Employers' Liability Law and said Section VII of Article XVIII, of the Constitution of Arizona, are in contravention and violation of the Constitution of the United States, particularly of the Fourteenth Amendment thereto, in that they seek to deprive this plaintiff in error of its property without due process of law, and to deny it the equal protection of the laws of the State of Arizona, by subjecting it to unlimited liability for

damages for personal injuries suffered by its employee without any fault, wrong or negligence on the part of this plaintiff in error, causing such injuries or contributing thereto, and that for the reasons in this paragraph above set forth, said complaint does not state facts sufficient to constitute a cause of action against this plaintiff in error.

III.

Because the court erred in overruling plaintiff in error's special demurrer No. 2, demurring to defendant in error's complaint on the ground that it appears on the face of said complaint that defendant in error seeks to recover judgment against plaintiff in error under and by virtue of the provisions of Chapter VI, of Title XIV, of the Civil Code, Revised Statutes of Arizona, 1913, known as the Employers' Liability Law, and that said Employers' Liability Law is in violation and contravention of the Constitution of the State of Arizona, and particularly of Sections 5 and 7, of Article XVIII thereof, in that said Employers' Liability Law attempts to give defendant in error the right to recover damages of plaintiff in error in this action notwithstanding the injuries for which such damages are claimed were contributed to and in part caused by defendant in error's
128 own negligence and attempts to deprive plaintiff in error of the right to wholly defeat this action by showing that said injuries were contributed to and in part caused by defendant in error's own negligence, and that for the reasons in this demurrer set forth, said complaint does not state facts sufficient to constitute a cause of action against the plaintiff in error.

IV.

Because the court erred in overruling plaintiff in error's special demurrer No. 7, demurring to defendant in error's amended complaint on the ground that it appears in said complaint that the alleged injury or injuries to this defendant in error, if any there were, were occasioned wholly by, and resulted from the usual and ordinary risks of the employment in which defendant in error was engaged at the time and place of the said alleged injury or injuries as in said complaint described, and were wholly assumed by this defendant in error in entering upon and continuing in said employment, and that said risks were wholly known to and appreciated by said defendant in error in entering on and continuing in said employment, or by the exercise of reasonable diligence on the part of this defendant in error, could have been fully known to and appreciated by him, in that it is not alleged in said complaint that the dangers of said employment at the time and place and in the manner mentioned and described in said complaint, were latent or hidden from or undiscovered to this plaintiff, and that by the exercise of due or any diligence or care for his personal safety, that he could not have discovered said conditions and have thereby avoided his said injury or injuries.

V.

Because the court erred in overruling plaintiff in error's special demurrer No. 8, demurring to defendant in error's amended complaint on the ground that it is not alleged in said complaint
129 that the acts and things done or said by the officers, servants, employees or other agents of this plaintiff in error, at the time and place of defendant in error's alleged injury or injuries by this defendant in error in his complaint alleged to have caused the said injury or injuries, were done and said by such officers, servants, employees or other agents of this plaintiff in error, while acting within the course of the employment and within the scope thereof of said officers, servants, employees or other agents, while then and there in the employ of this plaintiff in error.

VI.

Because the court erred in granting defendant in error's motion to strike that part of plaintiff in error's amended answer, being that part of said answer on page 6 thereof as follows:

"Further answering said complaint as a separate defense to this action, defendant alleges that the alleged injury or injuries, if any, were suffered by plaintiff, either as alleged in said complaint or otherwise, by plaintiff's own want of care, and but for such want of care such accident or injury would not have occurred."

VII.

Because the court erred in sustaining defendant in error's demurrer to paragraph 4 on page 6 of said amended answer, said paragraph being as follows:

"For further defense to said complaint. defendant alleges that the alleged injury or injuries, if any, were suffered by plaintiff, either as alleged in said complaint, or otherwise, were wholly occasioned by and wholly resulted from the open, usual and ordinary risks from the employment in which plaintiff was engaged at the time and place of his alleged injury or injuries, as in said complaint described, which said risks of said employment were wholly assumed by plaintiff by entering upon and continuing in said employment. That said risks were fully known to and appreciated by said plaintiff in entering upon and continuing in said employment, or by the exercise of reasonable diligence on his part, should have been fully known and appreciated by him."

VIII.

Because the court erred in sustaining the defendant in error's objection to the following question asked Richard Bray, the defendant in error, in behalf of the plaintiff in error upon
130 plaintiff in error's cross examination of the said Bray under the statutes:

"Q. Now, Mr. Bray, I will ask you this question: When you first went to see Doctor Goodrich, is it not a fact that upon repeated questionings by him as to whether you had received a head injury, you did not deny receiving those injuries?"

IX.

Because the court erred in sustaining the defendant in error's objection to the following question asked Richard Bray, the defendant in error, in behalf of the plaintiff in error, upon plaintiff in error's cross examination of the said Bray under the statute:

"Q. I will ask you, Mr. Bray, if on the taking of your deposition in Salt Lake City in October of this year you weren't asked if, when you went to see the doctors in Morenci, upon repeated questioning, if you had received such an injury, you didn't deny having received that injury; and did you not reply that you might or might not?"

X.

Because the court erred in sustaining defendant in error's objection to the following question propounded by the plaintiff in error to Richard Williams called on behalf of the plaintiff in error:

"Q. I will ask you what would be the thing done, as a common practice, in the mine at Morenci in the event that a miner or timberman was working with his helper, and in the presence of his helper the timberman should sustain such an injury as by being hit on the head with a rock and knocked unconscious for a period of, we will say, from five to ten minutes?"

XI.

Because the court erred in denying plaintiff in error's motion for a directed verdict in behalf of the plaintiff in error.

XII.

Because the court erred in giving to the jury the following instruction:

"You are further instructed that the law under which this
131 action is brought bases the liability of the defendant company for damages solely upon the fact that the accident and the resulting injuries were due to a condition or conditions of hazardous occupation of an employee in the service of such employer in said hazardous occupation. Now, so far as I am advises, that term has never been defined, and I have not found anyone who seems to know what that means. I do not know that I clearly understand exactly what it does mean, but I will give you what I believe is the meaning of the term, "condition or conditions of employment." The term "condition or conditions of employment," as used in the Arizona Employers' Liability Act, means a situation or succession of situations arising in the progress of the work being done by the employee, which may endanger the life or safety of the employee,

whether arising from the negligence of the employer or otherwise. It includes all such situations as could or might be foreseen, or such as might in the ordinary course of events come about, but does not include those extraordinary occurrences or situations which would not naturally be brought about even by the negligence of the employer, and which could not, by the exercise of the highest degree of prudence and foresight have been foreseen."

XIII.

Because the evidence at the trial was insufficient to justify the verdict of the jury in this; viz:

For the reason that there was no evidence introduced at the trial on the part of the defendant in error or on the part of the plaintiff in error, proving or tending to prove directly or by inference that the injury or injuries of this defendant in error upon which defendant in error predicated his action, were not caused by his own negligence.

XIV.

Because the damages assessed by the jury are excessive.

XV.

Because the verdict of the jury is against the law.

XVI.

Because under the law and the evidence in the cause, the verdict and judgment should be for the plaintiff in error.

Wherefore plaintiff in error prays that the judgment of said Court be reversed.

W. C. McFARLAND,
H. A. ELLIOTT,
*Attorneys for the Arizona Copper Company, Limited, Plaintiff in Error.*

Endorsement: No. 44 Tucson. In the District Court of the United States for the District of Arizona. The Arizona Cop-
132 per Company, Limited, a corporation, Plaintiff in Error, vs. Richard Bray, Defendant in Error. Assignment of Errors. W. C. McFarland, and H. A. Elliott, Attorneys for Plaintiff in Error. Filed March 4, A. D., 1916. Mose Drachman, Clerk, by Effie D. Botts, Deputy Clerk. Received copy of within Petition for Writ of Error and Assignments of Error this 4th day of March, 1916. Frank E. Curley, Attorney for Defendant in Error.

133 In the District Court of the United States in and for the District of Arizona.

THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Plaintiff in Error,
vs.
RICHARD BRAY, Defendant in Error.

*Order Allowing Writ of Error from the Supreme Court of the United States and Fixing Amount of Supersedeas Bond.*

On this 4th day of March, 1916, came Plaintiff in Error, by W. C. McFarland and H. A. Elliott, its attorneys, and filed herein and presented to the Court its petition, praying for the allowance of a writ of error intended to be urged by it; praying also that a transcript of the record and proceedings and papers in said cause, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises.

In consideration whereof said writ of error is allowed upon said Plaintiff in Error giving a bond according to law in the sum of Twelve Thousand ($12,000) Dollars, which shall operated as a supersedeas bond.

And it is further ordered that said petition is hereby allowed and granted, and that the writ of error be allowed in said cause, returnable before the Supreme Court of the United States on the 1st day of May, 1916; and that the Clerk of this Court is authorized and directed to sign and seal the writ, and that a transcript of all proceedings and papers in said cause shall be made and transmitted to the United States Supreme Court.

It is further ordered that all proceedings herein be stayed
134 until determination of said writ of error by said Supreme Court of the United States.

WM. H. SAWTELLE,
*Judge of the District Court of the United States in and for the District of Arizona.*

Service of the within order for a writ of error by receipt of true copy admitted this, the 4 day of March, 1916.

FRANK E. CURLEY,
*Attorney for Defendant in Error.*

Endorsement: No. 44 Tucson. In the District Court of the United States for the District of Arizona. The Arizona Copper Company, Limited, a corporation, Plaintiff in Error, vs. Richard Bray, Defendant in Error. Order allowing writ of Error from the Supreme Court of the United States, and Fixing amount of Supersedeas Bond. W. C. McFarland and H. A. Elliott, Attorneys for Plaintiff in Error. Filed March 4, A. D., 1916. Mose Drachman, Clerk, by Effie D. Botts, Deputy Clerk.

135 In the District Court of the United States in and for the District of Arizona.

THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Plaintiff in Error,
vs.
RICHARD BRAY, Defendant in Error.

*Bond on Writ of Error from Supreme Court of the United States.*

Know all men by these presents: That The Arizona Copper Company, Limited, a corporation, plaintiff in error above-named, as principal, and American Surety Company of New York, a corporation, organized and existing under and by virtue of the laws of the State of New York, and authorized to do business as a surety company in the State of Arizona, as surety, are held and firmly bound unto Richard Bray, Defendant in error, above named, in the full and just sum of Twelve Thousand ($12,000) Dollars, to be paid to the said defendant in error, to which payment well and truly to be made, the said principal binds itself, its successors and assigns jointly and severally, firmly by these presents.

Witness the names and seals of the said principal and surety, this 3rd day of March, 1916.

The condition of the above obligation is such that, whereas, at a session of the United States District Court, in and for the District of Arizona, in a suit pending in said court between The Arizona Copper Company, Limited, a corporation, plaintiff in error, and Richard Bray, defendant in error, said United States District Court,
136 in and for the District of Arizona, rendered a final judgment upon a verdict of the jury duly empanelled in said cause; said judgment by said District Court being in favor of Richard Bray and against said The Arizona Copper Company, Limited, and being for the sum of Nine Thousand ($9,000) Dollars with costs; and

Whereas, the said plaintiff in error obtained a writ of error to reverse the judgment of said United States District Court, in and for the District of Arizona, and filed a copy thereof in the Clerk's Office in said Court, and a citation directed to said Richard Bray, defendant in error, citing and admonishing the said defendant in error to be and appear before the Supreme Court of the United States;

Now, if the said, The Arizona Copper Company, Limited, shall prosecute its writ of error to effect, and shall answer all damages and costs that may be awarded against it, if it fails to make its plea

good, then the above obligation is to be void; otherwise to remain in full force and effect.

THE ARIZONA COPPER COMPANY, LIMITED,
By W. C. McFARLAND,
*Its General Attorney, Principal.*
AMERICAN SURETY COMPANY OF NEW YORK,
*A Corporation Organized and Existing under and by Virtue of the Laws of the State of New York and Authorized to do Business as a Surety Company in the State of Arizona,*
By H. E. HEIGHTON, *Attorney in Fact.*

Countersigned by
RALPH W. LANGWORTHY.

Approved this 4th day of March, A. D. 1916.
WM. H. SAWTELLE,
*Judge of the United States District Court in and for the District of Arizona.*

Endorsements: No. 44 Tucson. In the District Court of the United States, in and for the District of Arizona. The Arizona Copper Company, Limited, a corporation, Plaintiff in Error, vs. Richard Bray, Defendant in Error. Bond *of* Writ of Error
137 from Supreme Court of the United States. Copy received March 4, 1916. Frank E. Curley, Attorney for Def't in error. W. C. McFarland and H. A. Elliott, Attorneys for Plaintiff in error. Filed March 4, A. D. 1916. Mose Drachman, Clerk, by Effie D. Botts, Deputy Clerk.

138 In the United States District Court in and for the District of Arizona.

THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Plaintiff in Error,
vs.
RICHARD BRAY, Defendant in Error.

*Præcipe.*

To the Clerk of said Court:

SIR: Please issue a single certified transcript of the record on return to Writ of Error taken by plaintiff in error from the Supreme Court of the United States in the above entitled cause, consisting of the following:

1. Complaint.
2. Summons and Return.

3. Amended Answer.
4. Transcript of Minute Entries.
5. Verdict of Jury.
6. Judgment.
7. Bill of Exceptions.
8. Petition for Writ of Error.
9. Assignment of Error.
10. Bond and approval thereof given on Writ of Error.
11. Order allowing Writ of Error.
12. Writ of Error.
13. Citation in Error.

W. C. McFARLAND,
H. A. ELLIOTT,
*Attorneys for Plaintiff in Error.*

Endorsement: In the United States District Court in and for the District of Arizona. No. 44 Tucson. The Arizona Copper Company, Limited, a corporation, Plaintiff in Error, vs. Richard Bray, Defendant in Error, Præcipe. Filed this 4th day of March, 1916. Mose Drachman, Clerk, by Effie D. Botts, Deputy Clerk. Service of within Præcipe by true copy admitted this 4th day of March, 1916. Frank E. Curley, Attorney for Defendant in Error. W. C. McFarland and H. A. Elliott, Attorneys for Plaintiff in Error, Clifton, Arizona.

139 *Certificate of Clerk United States District Court to Transcript of Record.*

In the United States District Court for the District of Arizona

No. 44. Tucson.

THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Plaintiff in Error,
vs.
RICHARD BRAY, Defendant in Error.

UNITED STATES OF AMERICA,
*District of Arizona, ss:*

I, Mose Drachman, Clerk of the United States District Court for the District of Arizona, do hereby certify that the foregoing pages, number 1 to 138, inclusive, constitute and are a true, complete and correct copy of the record, pleadings, and proceedings had in the case of Richard Bray, Plaintiff, vs. The Arizona Copper Company, Limited, a corporation, Defendant, No. 44 Tucson, in this Court, as the same remain on file and of record in said District Court, and I also annex and transmit the original Writ of Error and Citation in Error, in said action.

I further certify that the cost of preparing and certifying to said

record amounts to the sum of $163.30 and that the same has been paid in full by the plaintiff in Error, The Arizona Copper Company, Limited, a corporation.

In testimony whereof, I have hereunto set my hand and affixed the seal of the United States District Court for the District of Arizona, at Tucson, in said District, this twenty-fourth day of April,
140 in the year of our Lord one thousand nine hundred and sixteen, and of the Independence of the United States of America, the one hundred and fortieth.

[Seal United States District Court, District of Arizona.]

MOSE DRACHMAN,
*Clerk United States District Court,*
*District of Arizona,*
By EFFIE D. BOTTS,
*Deputy Clerk.*

141 In the District Court of the United States in and for the District of Arizona.

THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Plaintiff in Error,
vs.
RICHARD BRAY, Defendant in Error.

*Writ of Error.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the United States District Court in and for the District of Arizona and the Honorable Judge thereof, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment, of a plea which is in said United States District Court, in and for the District of Arizona, between The Arizona Copper Company, Limited, a corporation Plaintiff in Error, and Richard Bray, Defendant in Error, *and* manifest error hath appeared to the great damage of said Plaintiff in Error, as by its complaint appears; and it being fit, and we being willing that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf:

You are hereby commanded, if judgment be therein given that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same to *this,* the Supreme Court of the United States, together with this writ, so you have the same in the said Supreme Court at
142 Washington, D. C., within sixty days from the date hereof, that the records and proceedings aforesaid being inspected, the Supreme Court may cause further to be done herein to correct that error, what of right and according to the law and customs of the United States, should be done.

Witness: The Honorable Edward Douglass White, Chief Justice of the United States Supreme Court, this 4th day of March, in the year of our Lord, One Thousand, Nine Hundred and Sixteen.

[Seal United States District Court, District of Arizona.]

MOSE DRACHMAN,
*Clerk of the United States District Court*
*in and for the District of Arizona,*
By EFFIE D. BOTTS,
*Deputy Clerk.*

Allowed by
WM. H. SAWTELLE,
*Judge of the United States District Court*
*in and for the District of Arizona.*

Service of within writ of error by receipt of true copy admitted, this, the 4 day of March, 1916.

FRANK E. CURLEY,
*Attorney for Defendant in Error.*

142½ [Endorsed:] No. 44 Tucson. In the District Court of the United States, in and for the District of Arizona. The Arizona Copper Company, Limited, a Corporation, Plaintiff in Error, vs. Richard Bray, Defendant in Error. Order. W. C. McFarland and H. A. Elliott, Attorneys for Plaintiff in Error. Filed March 4 A. D. 1916. Mose Drachman, Clerk, by Effie D. Botts, Deputy Clerk.

143 In the District Court of the United States in and for the District of Arizona.

THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Plaintiff in Error,
vs.
RICHARD BRAY, Defendant in Error.

*Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to Richard Bray and to L. Kearney and Frank E. Curley, your attorneys, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, D. C., on the 1st day of May, 1916, pursuant to a writ of error filed in the Clerk's Office of the United States District Court, in and for the District of Arizona, wherein The Arizona Copper Company, Limited, is Plaintiff in Error and you, Richard Bray, are Defendant in Error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness: The Honorable William H. Sawtelle, Judge of the United States District Court, in and for the District of Arizona, this 4th day of March, A. D., 1916.

WM. H. SAWTELLE,
*Judge of the United States District Court*
*in and for the District of Arizona.*

144–145 Service of within citation by receipt of a true copy admitted this 4 day of March, 1916.

FRANK E. CURLEY,
*Attorney for Defendant in Error.*

146 [Endorsed:] No. 44 Tucson. In the District Court of the United States, in and for the District of Arizona. The Arizona Copper Company, Limited, a Corporation, Plaintiff in Error, vs. Richard Bray, Defendant in Error. Citation. W. C. McFarland and H. A. Elliott, Attorneys for Plaintiff in Error. Filed March 4 A. D. 1916, at — M. Mose Drachman, Clerk, by Effie D. Botts, Deputy Clerk.

Endorsed on cover: File No. 25,286. Arizona D. C. U. S. Term No. 478. The Arizona Copper Company, Limited, plaintiffs in error, vs. Richard Bray. Filed May 9th, 1916. File No. 25,286.